100th Congress
2d Session
HOUSE OF REPRESENTATIVES
Rept. 100-963
Part 1

VETERANS' JUDICIAL REVIEW ACT

September 23, 1988.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. Montgomery, from the Committee on Veterans' Affairs, submitted the following

REPORT

[To accompany H.R. 5288]

[Including cost estimate of the Congressional Budget Office]

The Committee on Veterans' Affairs, to whom was referred the bill (H.R. 5288) to amend title 38, United States Code, to provide an improved system of review of decisions of the Veterans' Administration with respect to claims for veterans' benefits, and for other purposes, having considered the same, reports favorably thereon with an amendment, by a vote of 29 to 4, and recommends that the bill as amended do pass.

The amendment (stated in terms of the page and line numbers of the introduced bill) follows:

Page 12, strike out lines 1 through 7, and insert in lieu thereof the following:

> "(c) The Court shall, upon a showing of good cause, require employees of the Veterans' Administration to testify at a hearing or to give a deposition in a proceeding before the Court."

Introduction

On September 8, 1988, the Committee held a hearing on judicial review of veterans' claims. The following bills were discussed: H.R. 639, introduced by the Honorable Lane Evans; H.R. 5039, introduced by request by Chairman Montgomery; S. 11, introduced by the Honorable Alan Cranston, and S. 2292, introduced by the Honorable Frank H. Murkowski. Witnesses at the hearing

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included: the Honorable Morris S. Arnold, Judge of the U.S. District Court for the Western District of Arkansas, representing the Judicial Conference of the United States; Mr. Paul R. Verkuil, President, College of William and Mary; Mr. William Bennett of the National Vietnam Veterans Coalition; Mr. Sidney Cooper, National Legislative Director, Veterans Due Process; Mr. John F. Heilman, National Legislative Director, Disabled American Veterans, accompanied by Mr. Joseph C. Zengerle, DAV Counsel; Mr. Samuel J. Walsh, Assistant Director, National Legislative Commission, and Mr. John F. Sommer, Jr., Director, National Veterans Affairs and Rehabilitation Commission, The American Legion; Mr. James N. Magill, Director, National Legislative Service, Veterans of Foreign Wars; Mr. Gordon Mansfield, Associate Executive Director for Government Relations, Paralyzed Veterans of America; Mr. Richard E. O'Dell, Vice President and Chairman, Committee on Advocacy, and Mr. Paul S. Egan, Legislative Director, Vietnam Veterans of America; Mr. Richard W. Johnson, Jr., Director of Legislative Affairs, Non Commissioned Officers Association; and Mr. Donald L. Ivers, General Counsel, accompanied by Mr. John H. Thompson, Assistant General Counsel, Veterans' Administration.

On August 11, 1988, the Subcommittee on Compensation, Pension and Insurance held a hearing on the operation of the Board of Veterans' Appeals. Witnesses at the hearing included: Mr. Kenneth E. Eaton, Chairman, Board of Veterans' Appeals, Veterans' Administration; Mr. Gordon R. Thorson, Special Assistant, National Legislative Service, Veterans of Foreign Wars; Mr. John C. Bollinger, Associate Legislative Director, Paralyzed Veterans of America; Mr. Charles M. Williams, Executive Director, American Ex-Prisoners of War; Mr. Richard F. Schultz, Associate National Legislative Director, Disabled American Veterans; Mr. Richard E. O'Dell, Vice President and Chairman, Committee on Advocacy, and Mr. Paul E. Egan, Legislative Director, Vietnam Veterans of America; and Mr. Samuel J. Walsh, Assistant Director, National Legislative Commission, and Mr. Philip R. Wilkerson, Assistant Director, National Veterans Affairs and Rehabilitation Commission, The American Legion.

On May 26, 1988, the Subcommittee on Compensation, Pension and Insurance held a hearing on the timeliness and quality of processing claims for compensation, pension and insurance in VA Regional Offices. Witnesses at the hearing included: Mr. R. J. Vogel, Chief Benefits Director, Veterans' Administration; Mr. Albert J. Bland, National Commander, and Mr. Charles M. Williams, Executive Director, American Ex-Prisoners of War; Mr. Richard F. Schultz, Associate National Legislative Director, Disabled American Veterans; Mr. Samuel J. Walsh, Assistant Director, National Legislative Commission, and Mr. Philip R. Wilkerson, Assistant Director, National Veterans Affairs and Rehabilitation Commission, The American Legion; Mr. Noel C. Woosley, National Service Director, AMVETS; Mr. Gordon R. Thorson, Special Assistant, National Legislative Service, Veterans of Foreign Wars; Mr. John C. Bollinger, Associate Legislative Director, Paralyzed Veterans of America; and Mr. Richard E. O'Dell, Vice President, and Mr. Paul S. Egan, Legislative Director, Vietnam Veterans of America.

On October 6, 1987, the Subcommittee on Compensation, Pension and Insurance held a hearing on the operation of the Board of Veterans' Appeals. Witnesses at the hearing included: Mr. Kenneth E. Eaton, Chairman, Board of Veterans Appeals, Veterans' Administration; Mr. Frank DeGeorge, Associate Legislative Director, Paralyzed Veterans of America; Mr. Richard F. Schultz, Associate National Legislative Director, Disabled American Veterans; Mr. Richard E. O'Dell, Vice President and Chairman, Committee on Advocacy, and Mr. Paul S. Egan, Legislative Director, Vietnam Veterans of America; Mr. Philip R. Wilkerson, Assistant Director, National Veterans Affairs and Rehabilitation Commission, The American Legion; and Mr. Gordon R. Thorson, Special Assistant, National Legislative Service, Veterans of Foreign Wars.

On May 7, 1987, the Subcommittee on Compensation, Pension and Insurance held a hearing on the timeliness and quality in the VA Department of Veterans Benefits. Witnesses at the hearing included: Mr. R. J. Vogel, Chief Benefits Director, Veterans' Administration; Mr. Joe Dorolek, Adjudication Officer, Atlanta VA Regional Office; Mr. Barry M. Weisberg, Adjudication Officer, Cleveland VA Regional Office; Mr. Patrick Courtney, Adjudication Officer, St. Louis VA Regional Office; Mr. Tim Ivers, Adjudication Officer, St. Petersburg VA Regional Office; Mr. Ron Abrams, legal consultant, Veterans' Administration; Mr. Michael R. Leaveck, Legislative Director, Vietnam Veterans of America; Mr. Richard Schultz, National Associate Legislative Director, Disabled American Veterans; Mr. Paul S. Egan, Deputy Director, National Legislative Commission, and Mr. Philip R. Wilkerson, Assistant Director, National Veterans Affairs and Rehabilitation Commission, The American Legion; Mr. Gordon R. Thorson, Special Assistant, National Legislative Service, Veterans of Foreign Wars; and Mr. Bob Moran, Associate Legislative Director, Paralyzed Veterans of America.

On May 20, June 4, June 24 and June 25, 1986, the Committee held hearings to discuss judicial review of veterans claims. H.R. 585, introduced by the Honorable Don Edwards, and similar bills were discussed. Witnesses at the hearings included: The Honorable David E. Bonior; Mr. Gordon P. Erspamer, Legal Advisory Board, National Association of Radiation Survivors, accompanied by Mr. Frederick Thompson, Legislative Director; the Honorable Elmo B. Hunter, Senior District Judge of the U.S. District Court, Western District of Missouri, on behalf of the Judicial Conference of the U.S., accompanied by Ms. Christy Massie; the Honorable Leon E. Panetta; Ms. Bertie Rowland, President, National Association of Veteran Program Administrators; Mr. Jerry P. Tiede, a U.S. Air Force veteran; Mr. John A. Yagjian, a U.S. Army veteran, accompanied by Charles A. Meade, Attorney-at-Law; Dean Frederick Davis, University of Dayton School of Law, on behalf of the American Bar Association; Mr. John F. Heilman, National Legislative Director, Disabled American Veterans, accompanied by Mr. Charles E. Joeckel, Jr., Executive Director and Mr. Norman B. Hartnett, former DAV Executive Director; Mr. Robert O. Muller, President, Vietnam Veterans of America, accompanied by Mr. David F. Addlestone, Director, Legal Services, Mr. Barton F. Stitchman, Litigation Director and Mr. Michael Leaveck, Legislative Director; the Honorable Neil F. Hartigan, Attorney General of the State of Illinois; Mr. Allen J. Lynch, Chief, Veterans Advocacy Division of the Office of the Illinois Attorney General; Mr. Jerry L. Mashaw, William Nelson Cromwell Professor of Law at Yale University; Mr. Philip E. Riggin, Director, National Legislative Commission, The American Legion, accompanied by Mr. Robert E. Lynch, Director, National Veterans Affairs and Rehabilitation Commission; Mr. Keith A. Rosenberg of Whiteford, Taylor & Preston law firm; Mr. Sydney J. Shuman, former Chairman of the Board of Veterans' Appeals; Mr. Robert J. Cynkar, Deputy Assistant Attorney General, Civil Division, U.S. Department of Justice; Mr. Donald L. Ivers, General Counsel, Veterans' Administration, accompanied by Mr. R. J. Vogel, Chief Benefits Director and Kenneth Eaton, Chairman, Board of Veterans' Appeals; Mr. Allan Kamerow, American Veterans Committee, accompanied by Ms. Jackie Reese, a veteran's widow; Mr. James N. Magill, Director, National Legislative Service, Veterans of Foreign Wars; Col. David J. Passamaneck, National Legislative Director, AMVETS, accompanied by Mr. Richard C. Vaspory, National Service Officer; Mr. R. Jack Powell, Executive Director, Paralyzed Veterans of America; Mr. Jeff Stanton, Veterans Due Process, accompanied by Ms. Judy Beck, Ms. Laverna Bishop, Mr. Sidney Cooper and Mr. Fred Jossi; and Mr. Robert W. Valimont of Power, Bowen, and Valimont law firm.

On September 15, 1988, the committee ordered H.R. 5288 reported to the House by a vote of 29 to 4.

Summary of Reported Bill

The reported bill, if enacted, would:

(1) Abolish limitations on fees that an attorney may charge a veteran for representing the veteran once the Veterans' Administration has made a final decision on a claim. The Court of Veterans Appeals could review and reduce a fee if it finds that such fee is excessive or unreasonable.

(2) Establish an independent Court of Veterans Appeals in lieu of the existing Board of Veterans' Appeals, similar to the Court of Military Appeals and the United States Tax Court, to rule on all disputes involving the Veterans' Administration and veterans.

(3) Provide for review by the Court of Appeals for the Federal Circuit of any legal matter relied on by the Court of Veterans Appeals in making a decision in a particular case. This would include constitutional, statutory, and regulatory matters, and interpretations of law.

(4) Allow challenges by organizations or individuals of VA regulations and other interpretive rules under the Administrative Procedure Act by the Court of Appeals for the Federal Circuit.

BILL PROVISIONS

Judicial Review of Rulemaking

The reported bill would require the Administrator to provide notice of proposed rules or changes to existing rules in accordance with the Administrative Procedure Act (APA), 5 U.S.C. 553. The

VA would also be directed to comply with the publication requirement of section 552 of the Act particularly with respect to opinions and interpretations of the General Counsel. A decision to issue, or a failure to issue, a rule or other matter (other than an action relating to the adoption or revision of the rating schedule) would be reviewable in the United States Court of Appeals for the Federal Circuit. This Court would be authorized to review the Administrator's decision in accordance with the judicial review provision of the APA. Generally, a person who claims to be "aggrieved by agency action within the meaning of a relevant statute" would have standing to bring a suit seeking judicial review of agency issuances.

Attorney Fees

The bill would prohibit attorneys from charging any fee in connection with an application for VA benefits. However, once the VA issues a "statement of the case", which confirms its intent to deny a claim, a veteran could engage and pay a reasonable fee to an attorney. The attorney would be required to file a copy of the fee agreement with the Court of Veterans Appeals. The Court would be authorized to order a reduction in the fee if it finds that the fee is excessive or unreasonable.

Court of Veterans Appeals

An independent Court of Veterans Appeals would be established in the executive branch in lieu of the existing Board of Veterans' Appeals. There are a number of similar executive branch or Article I Courts already in existence; two of the most notable are the Court of Military Appeals and the Tax Court.

The Court of Veterans Appeals would have exclusive jurisdiction to consider all questions involving benefits under laws administered by the VA. This would include factual, legal, and constitutional questions. The only exception is the schedule for rating disabilities prescribed under 38 U.S.C. 355, which would not be subject to review by the Court. A determination by the Court as to any factual matter would be final and could not be reviewed in any other court. Decisions on legal matters could be reviewed by the Court of Appeals for the Federal Circuit in accordance with the provisions set out below.

The Court would be composed of a chief judge, two deputy chief judges, and not more than 62 associate judges. Judges would be required to be members of the bar. The Court would be authorized to employ medical advisers; it would also be authorized to employ hearing officers to take testimony and evidence and make recommendations to the Court.

The judges of the Court would be appointed by the President with the advice and consent of the Senate; the chief judge and two deputy chief judges would be appointed for 15-year terms; the associate judges would be appointed for 10-year terms, although the initial appointments would be staggered in order to avoid discontinuity in the membership of the Court. A judge could be removed only for neglect of duty, engaging in the practice of law, or because of physical or mental disability. The chief judge and two deputy chief judges would receive the same salary as judges of the United States District Court (presently $89,500). Associate judges would receive compensation at a rate not to exceed that payable for Executive Level IV (presently $77,500).

The chief judge would be authorized to assign cases to judges sitting alone, or to divide the Court into panels of at least three judges, and to designate the chief of such panels. The principal office of the Court would be in the District of Columbia, but the Court would be authorized to sit at any place in the United States in order to afford veterans a reasonable opportunity to appear before the Court.

The Court would be authorized to charge a fee of up to $50 for the filing of any petition with the Court. This fee could be waived in the case of hardship.

The Court would be empowered to establish its own rules of practice and procedure. However, the Court may not require that a person be a member of any profession in order to appear before it. The Administrator of Veterans' Affairs would be represented before the Court by the VA General Counsel.

The Court would be authorized to administer oaths, examine witnesses, and issue subpoenas. The Court could require VA employees to testify or give depositions only upon a showing of good cause. If the Court finds the record insufficient upon which to base a decision, it may remand the petition or take such other steps it considers appropriate.

The Court would be authorized to hold persons appearing before it in contempt for misbehavior or disobedience to its lawful orders.

Procedure for Filing Appeal and Decisions of the Court

The procedure for filing an appeal called for in the reported bill would be identical in most major respects with the procedure presently used by the Veterans' Administration and the Board of Veterans' Appeals.

A petitioner would initiate the appellate process by filing a notice of disagreement (NOD) with the VA within 180 days of the mailing of the decision with which disagreement is expressed. Following the receipt of the NOD, the VA would be required to review the claim; if the VA does not allow the benefit sought, it would be required to promptly issue a statement of the case. Special procedures for expediting contested claims where only one person may be awarded the benefit would be required.

As under present law, a statement of the case would summarize the evidence relied upon by the VA, cite applicable laws and regulations, explain how the law affects the agency's decision and summarize the reasons for the agency decision. Following the issuance of the statement of the case, an appeal to the Court must be filed within 90 days. The statement of the case will also include a notice of the petitioner's rights, including the right to employ an attorney, to be represented by a service organization or other person admitted to practice before the Court, or to represent himself. The period for perfecting an appeal may be extended by the Court for good cause.

The Court would be authorized to prescribe the form of an appeal. As under existing law, the appeal would be required to set out the errors it finds in the decision of the VA and what benefits are sought on appeal.

Testimony and argument before the Court would be in accordance with rules which the Court shall prescribe. Generally, the proceedings of the Court would be open to the public, except that the Court may make provision for the protection of confidential information. The Court may employ hearing officers to receive testimony and evidence and perform such other functions as the Court orders. Because the Court would only have jurisdiction over issues which were decided by the VA, any new issues raised by the claimant on appeal must be remanded for an initial decision by the VA. However, the Court would be free to hear any evidence presented by the parties before it on issues which have been properly appealed.

The Court would be required to base its decision on the entire record. As is presently the case in matters appealed to the Board of Veterans' Appeals, the Court would not be required to give any deference to the decision of the Administrator, and may substitute its judgment for' the judgment of the VA decision-maker. It may remand the case if it finds the evidence insufficient upon which to base a decision.

A decision on a proceeding would be by a majority vote if more than one judge is assigned to decide a case. The decision must include a statement of the Court's findings of fact and conclusions of law. The decision of a panel or a judge would become the decision of the Court after 30 days, unless within that time the chief judge decides to have the case reviewed by an enlarged section of the Court. If an enlarged section is assigned to the case, its decision would constitute the decision of the Court.

At the conclusion of proceedings before the Court, records pertaining to the petitioner's claim would be returned to the VA for its use in the ordinary handling of claims for benefits. The Court may also designate decisions which it determines to have value as precedent, and provide for the publication of such decisions for public information and use.

Judicial Review of Court of Veterans Appeals Decisions

Either the veteran or the Administrator may appeal a decision of the Court of Veterans Appeals with respect to the validity of any statute, regulation, or interpretation thereof. Review of factual determinations made by the Court would not be permitted. Appeals may be made only to the Court of Appeals for the Federal Circuit (CAFC). The decision of the CAFC would be final, except that it may be reviewed by the Supreme Court upon certiorari. The disability rating schedule issued under 38 U.S.C. section 355 would not be subject to judicial review.

Whenever the Court of Veterans Appeals is presented with a case in which there is a substantial question of law upon which the veteran and the VA differ, and the Court decides that immediate consideration of that question by the CAFC may materially advance the disposition of the appeal, it shall certify that such a question is presented in the case. Either party may petition the CAFC to consider and decide the question.

In any case presented to the CAFC, the court would be required to decide all relevant questions presented to it. The court shall hold unlawful and set aside statutes, regulations, or interpretations thereof found to be:

(1) contrary to constitutional right, power, privilege or immunity;
(2) in excess of statutory jurisdiction or authority;
(3) without observance of procedure required by law; or
(4) resting upon a policy judgment, reasoning, or factual premise so unacceptable as to render the matter arbitrary or capricious.

The CAFC would not have jurisdiction to review any allegations that the Court of Veterans Appeals made an erroneous factual determination nor could it review the application of any law or regulation to those facts.

The Supreme Court shall prescribe rules for review of decisons of the Court of Veterans Appeals by the CAFC in accordance with section 2072 of title 28.

Changes to Veterans' Administration Procedures and the Board of Veterans' Appeals

Existing VA rules as to the burden of proof, the right to reopen claims where new and material evidence is presented, and the doctrine of reasonable doubt would be restated and codified.

(a) A claimant for VA benefits has the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded. The VA is required to assist a claimant in developing facts pertinent to his or her claim.

(b) When there is an approximate balance of positive and negative evidence regarding the merits of an issue, the benefit of the doubt in resolving the issue will be given to the claimant.

Authority to request an independent medical opinion in cases involving complex or controversial issues would be given to the Administrator. This authority presently rests with the Board of Veterans' Appeals.

The Court would begin its existence on June 1, 1989. The personnel presently employed by the Board of Veterans' Appeals, as well as all unexpended funds, property and records would be transferred to the Court of Veterans Appeals under applicable Office of Personnel Management procedures and in accordance with any Executive Order issued by the President. Any person who files a notice of disagreement on or after the date that the bill becomes law would be entitled to have his or her claim reviewed in accordance with the procedures authorized by the reported bill. Matters pending before the Board of Veterans' Appeals would be automatically transferred to the Court on the effective date. The bill would require the President to nominate the chief judge of the Court first, and that nomination must be made not later than April 1, 1989.

BACKGROUND

HISTORICAL OVERVIEW

The origin of legislation providing relief for soldiers and sailors disabled in the service of their country has been traced to Elizabethan England and a statute providing pensions to veterans who had served since 1588, the year of the Spanish Armada. *See* Federal Laws Relating to Veterans of Wars of the United States (Annotated), Government Printing Office, 25 (1932). The American colonies continued this tradition of providing pensions to maimed and disabled soldiers, and shortly after the Declaration of Independence, the Continental Congress promised to provide pensions to those disabled in the cause of American independence. The earliest Congressional enactments providing pensions to Revolutionary War veterans did not specify any procedure for the administration of the pensions, with the result that Congress was required to actually allow the claims. In 1792, the Congress imposed the duty of deciding whether a veteran's disability was service-connected, and if so, the extent of his disability, on the Circuit Courts of the United States. The Circuit Justices were mostly of the opinion that Congress could not require the judiciary to make such determinations, and as a consequence the law was subsequently revised to vest decision-making authority in the Secretary of War. *Id.* at 26. *See* Bloch and Marcus, *John Marshall's Selective Use of History in Marbury* v. *Madison,* 1986 Wis. L. Rev. 301.

Thus, from the beginning of the Republic, the courts and Congress have clashed over the proper way to adjudicate claims for veterans benefits, with the courts more often than not disclaiming any proper role in the adjudication of veterans' benefit claims. It should also be noted that over the years, the Congress has declared its views that there should be no judicial remedy with respect to claims for veterans benefits, and this policy was honored for nearly 170 years. It is a recent phenomena that courts have become involved in reviewing the correctness of administrative agency decision-making. Indeed, the administrative agencies such as the Veterans' Administration were created to meet a need for fairly and efficiently administering the various laws regulating government benefits. As the administrative agencies became more powerful and an increasing number of citizens and economic interests were affected by their decisions, the power of the judiciary was invoked to "control government intrusions into private liberty and property interests" Breyer and Stewart, ADMINISTRATIVE LAW AND REGULATORY POLICY, 28 (2d Ed. 1985)".

Notwithstanding the increasing role of the courts in defining the extent of administrative agencies' powers, the Congress has long precluded, without dissent by the courts, judicial review of veterans benefits claims. While the Supreme Court has hinted that some review of VA decision-making may be constitutionally required, *cf. Northern Pipeline Constr. Co.* v. *Marathon Pipeline Co.,* 458 U.S. 50, 69 (1982)(plurality opinion), "it is a well settled that the United States cannot be sued without its consent." *See United States* v. *Mitchell,* 445 U.S. 535, 538 (1980); *Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 688 (1949); *Ickes* v. *Fox,* 300 U.S. 82, 96 (1937); C. Wright, LAW OF FEDERAL COURTS, sec. 22, at 115. When Congress consented to suits against the government in actions not sounding in tort through the passage of the Tucker Act in 1887, it exempted pension claims, which comprised virtually the entire veterans program." Van Dolsen, *Judicial Review of Allegedly Ultra Vire Actions of the Veterans' Administration: Does 38 U.S.C. Sec. 211(a) Preclude Review,* 55 Fordham Law Review 579, 594 (1987) (hereinafter *Judicial Review of VA Actions*).

While the passage of the Administrative Procedure Act in 1946 required standardization of many procedures utilized by the administrative agencies, the Veterans' Administration was effectively exempted from the APA's requirements by virtue of the language of section 4 of the Act (now codified as 5 U.S.C. 553(a)(2)) exempting matters relating to "loans, grants, benefits, or contracts". As a result, the Veterans' Administration stands in "splendid isolation as the single federal administrative agency whose major functions are explicitly insulated from judicial review". Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis,* 27 Stanford Law Review 905 (1975). *But see Hearings on Judicial Review of Veterans Claims Before the Subcommittee on Special Investigations of the Committee on Veterans' Affairs,* 96th Congress, 2d Session, (1980) 25-40 (Testimony of Richard Berg, Executive Secretary, Administrative Conference of the United States, setting out over 50 current statutes which purport to preclude review of executive branch decisions.) (Hereinafter *1980 House Hearings)*

SUMMARY OF COMMITTEE CONSIDERATION OF JUDICIAL REVIEW LEGISLATION

The House Committee on Veterans' Affairs met for the first time to consider legislation providing judicial review of veterans claims on May 6, 1952. *Hearing on H.R. 360 etc. before a Subcommittee of the Committee on Veterans' Affairs,* 82d Cong., 2d Sess. (1952). At that time, the veterans service organizations which testified were in favor of the proposals calling for judicial review of decisions of the Administrator on claims for compensation and pension. The Veterans' Administration opposed the various measures considered by the subcommittee and no action to report any of the measures was taken.

In 1960, the committee held eight days of hearings on nine bills which would have provided judicial review of decisions of the Administrator of Veterans' Affairs. *Hearings on H.R. 947 etc. before a Special Subcommittee of the Committee on Veterans' Affairs,* 86th Cong., 2d Sess. (1960). The Veterans' Administration opposed the bills being considered, extolling the existing claims system as one that provided a fair and responsive means of adjudicating the hundreds of thousands of claims for benefits made each year. One witness for the VA testified:

> As the Administrative Procedure Act itself says, there is an area which should be exempted from judicial review, the area where agency discretion has been vested by law in a particular agency. These invariably are the technical fields, which invariably would impose an almost impossible burden on the judges, because of their lack of technical knowledge and technical know-how required for adjudication in these particualr technical fields.

Id., at 2624 (statement of Mr. Bradford Morse, Deputy Administrator of Veterans' Affairs).

During these hearings, it was charged that the Board of Veterans' Appeals gave scant attention to appeals and that it was very unusual that the percentage of cases allowed by the Board varied little from year to year. *Id.* at 2640 (remarks of Rep. Saylor). Several veterans service organizations opposed the pending bills, while other veterans organizations, as well as a number of other witnesses (including the American Bar Association) supported various alternatives providing for outside review of VA decision-making. While the positions of the various organizations who testified at these hearings sometimes varied slightly during ensuing hearings, they generally followed the pattern established at these hearings for the next twenty-six years. The record of these hearings is 1,000 pages long.

On June 29, 1960, the committee ordered reported H.R. 12653, a bill to establish a Court of Veterans' Appeals, H. Rept. No. 2031, 86th Cong., 2d Sess. (1960). The court which would have been created consisted of five judges to be appointed by the President with the advice and consent of the Senate for ten year terms. The bill also provided for the appointment of up to 50 commissioners to conduct hearings and to make reports to the Court. The Court would have had exclusive jurisdiction to review decisions of the Board of Veterans' Appeals and its decisions would be final. The bill was placed on the consent calendar of the House and was passed over on August 23, 1960. No further action on it was taken by the House.

During the 1960 hearings, the committee examined the procedure and substance of VA decisions in order to determine whether the goals of accuracy and fairness were being met. As a result, in January of 1961, the Chairman of the Committee on Veterans' Affairs introduced several bills in the 87th Congress aimed at making the system of adjudicating VA claims fairer and decisions more understandable. One of these proposals, H.R. 866, proposed to amend the law governing the Board of Veterans' Appeals to require that its decisions separately state findings of fact and conclusions of law. "In the view of the committee a principal reason for requiring the Board to make findings of fact and conclusions of law is that it requires the members of the Board to use more care in the analysis and decision of each case that comes before it." H. Rept. No. 18, 87th Cong., 1st Sess. 2 (1961). This legislation eventually became P.L. No. 87-97.

In the second session of the 87th Congress, the committee reported legislation, H.R. 857, to require a statement of the case to be prepared by the VA in cases where the claimant disagreed with the VA's decision. Despite its opposition to the bill, the VA conceded that the bill was "interesting and far-reaching" and "could accomplish a worthwhile improvement in due process." H. Rept. 1454, 87th Cong., 2d Sess. 4. The measure was subsequently amended in the Senate and signed into law on September 16, 1962. P.L. No. 87-666. In the same Congress, P.L. 87-857 was enacted, making uniform and equitable rules for establishing the effective dates of both allowances and reductions or termination of benefits. These helped to assume that there would be no deprivation of such benefits without due process.

During 1962, the committee held a series of five hearings on bills providing for judicial review of veterans claims. *Hearing before a Special Subcommittee of the Committee on Veterans' Affairs*, 87th Cong., 2d Sess. on H.R. 282 etc. (1962). One of the witnesses expressed opposition to the pending bills in the following terms:

> Now, what we fear from this type of thing, Mr. Saylor, is, and we could be wrong on this, but I don't think so, that there will inevitably follow a formalizing of the adjudication process of the Veterans' Administration. I think there will inevitably follow a tightening up, if you will. or at least a systematizing of a set of rules of evidence, because this is the nature of a court, a court is bound by the rules of evidence . . . In other words, where we and the proponents of this bill part ways is not in the beginning where we say we want to do something that will help some veterans, not at the next step where we reach a conclusion that such an action would help some veterans, but it is after that when we say that it "would hurt more than it would help."

Id., at 1958 (statement of Mr. John Corcoran, The American Legion). The committee did not give further consideration to the bills providing for judicial review.

In 1970, the committee considered and reported H.R. 17958, a bill to increase disability compensation rates which also included an amendment to 38 U.S.C. 211(a) to broaden the prohibition on judicial review of decisions of the Administrator. This amendment is discussed in detail below in the section of the report on the legislative history of Section 211(a). The committee report on this legislation mentions no committee hearings which discussed this provision, and the committee held no hearings which dealt expressly with the subject of judicial review in the 91st Congress. *See* H. Rept. 1166, 91st Cong., 2d Sess. (1970).

In 1980, the committee again held oversight hearings on judicial review legislation following Senate passage of S. 330, a bill authorizing judicial review of decisions of the Administrator in U.S. District Court. In his letter requesting the Subcommittee on Oversight and Investigations to conduct the hearings, Chairman Roberts stated that he was "personally very much opposed to judicial review for many reasons" and that "there is no consensus among the national veterans' organizations on this matter." *Hearings before the Subcommittee on Judicial Review of Veterans Claims of* *the Committee on Veterans' Affairs,* 96th Cong., 2d Sess. 2. No legislation was reported or considered by the committee following these hearings. The Veterans' Administration took the position that if Congress wished to change the bar to judicial review of the Administrator's decisions, the VA would not object.

The Subcommittee on Oversight and Investigations held hearings again in 1983. The first witness was Senator Alan Cranston, then the ranking minority member of the Senate Committee on Veterans' Affairs, who urged the committee to take up the Senate-passed judicial review legislation, S. 636. The Veterans' Administration reverted to its prior posture of opposing judicial review legislation, a position it advocated once again when the full committee held four days of hearings on judicial review legislation in 1986. The committee failed to consider judicial review legislation during the 98th Congress, but in 1986, following hearings at which 26 witnesses testified, the committee met on July 16 to consider a bill which was very similar to the Senate-passed judicial review measure. The bill, H.R. 585, was tabled by a vote of 20–12.

ADJUDICATION OF CLAIMS FOR VA BENEFITS

Each year, the Veterans' Administration (VA) processes approximately 5 million claims. In most cases, claimants submit their own applications without assistance. If a claimant desires advice or other help, VA provides specially-trained personnel to answer inquiries and assist in the submission of the claim. VA's medical facilities often serve as an important referral source, and the major veterans service organizations also furnish claims assistance by trained specialists at no charge.

Congress has designed and fully intends to maintain a beneficial non-adversarial system of veterans benefits. This is particularly true of service-connected disability compensation where the element of cause and effect has been totally by-passed in favor of a simple temporal relationship between the incurrence of the disability and the period of active duty.

Implicit in such a beneficial system has been an evolution of a completely ex-parte system of adjudication in which Congress expects VA to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits. Even then, VA is expected to resolve all issues by giving the claimant the benefit of any reasonable doubt. In such a beneficial structure there is no room for such adversarial concepts as cross examination, best evidence rule, hearsay evidence exclusion, or strict adherence to burden of proof.

After a claim is filed, the agency helps the claimant compile evidence to support his or her claim. For example, in the case of a claim for service-connected disability compensation, VA requests the necessary records from the appropriate military department. Where these records prove insufficient to establish entitlement to the benefit being sought and the veteran has provided names of fellow servicemen or physicians who know of his disability, VA will write to them. The claimant is also told what additional evidence would be required, such as a report from a private physician. When necessary, a medical examination is scheduled with a VA or consulting physician at Government expense. The physician records the claimant's medical and social/industrial history, as well as all clinical findings, which provide an objective base for later evaluation by a rating board or Board of Veterans' Appeals. The physician does not provide conclusions as to the merits of the claim.

A claimant is free to submit medical reports from private physicians, statements from fellow service or family members, photographs, or any other evidence to supplement the claim. This material is incorporated into the official claims folder and becomes part of the record for review, without regard to any of the formal rules of evidence commonly found in courts.

The eligibility determination for VA benefits is made by a rating board at the local regional office. The rating board is composed of two lay members and one medical member. By express regulation, which has the force of law, this board resolves issues where a reasonable doubt exists in favor of the claimant. If a claimant requests a personal hearing prior to an initial decision on the claim, a hearing will be provided before the rating board. After an initial decision, a claimant has the right to a personal hearing before a different rating board or a hearing officer who is not a rating board member and who did not participate in the initial decision. The VA routinely grants pretermination or prereduction hearings, when requested, where pension or disability compensation benefits are at issue.

All hearings are informal, meaning that strict rules of evidence and procedure are not enforced, and non-adversarial, meaning that the VA has no advocate representing it at the hearing, it does not call witnesses, nor does it resort to cross-examination. The claimant, on the other hand, may present witnesses, be represented by an attorney, or rely on free representation from any of the various service organizations. After a decision has been reached, the VA provides the claimant with notice of the decision, as well as notice of appellate rights.

A dissatisfied claimant may appeal an adverse decision on his or her claim within one year to the Board of Veterans' Appeals (BVA). In addition, a claimant may reopen a case at any time at the local level by submitting additional evidence. Upon the filing of a Notice of Disagreement, which simply states a claimant's intention to appeal, the local rating board has the opportunity to reconsider and revise the original decision on the basis of new and material evidence, or the more technical grounds of "clear and unmistakable error" or a "difference of opinion."

If a decision is not revised, the claimant is provided with a statement of the case, which relates the relevant evidence, applicable law and regulations, and the reasons for the adverse decision. Upon responding to the statement of the case, a claimant's appeal is perfected and certified to the BVA for review.

Except in those cases where a prior decision by a rating board has become final due to failure to appeal in a timely manner, or in those cases where there is a prior BVA decision on the same issue, the BVA provides *de novo* review of a claimant's appeal, meaning that it considers anew all of the pertinent evidence of record. A claimant may submit new evidence at this stage, and also request an oral hearing on the issues appealed. Again, such hearings are informal and non-adversarial. Hearings may be held by hearing officers, who have not participated in the decision, acting as agents for the BVA, by the BVA itself in Washington, D.C., or by travel sections of the BVA that periodically visit regional offices. The BVA can change the initial result in a claim on the finding of error or merely on the basis of a different assessment of the weight of the evidence. The effective date of a favorable finding would be the date the claim was filed with the local office.

Further, in the context of a reopened claim, the BVA can reach a decision more favorable to the claimant than that reached by the BVA on a prior appeal. Finally, the BVA can remand a case for further development of the evidence or, on its own inititative, obtain medical advice from independent medical specialists. Every BVA decision provides a claimant with a complete explanation of the applicable law and regulations and the reasons for the BVA's action on each issue.

In summary, claims for VA benefits can be reviewed, perhaps on multiple occasions, on two separate administrative levels. Hearings are provided both at the initial stage of adjudication and on appeal to the BVA. Claimants may choose to be assisted at both levels by skilled advocates provided free of charge by the veterans service organizations. Claims receive thorough and careful consideration, and the adjudication system provides a full measure of due process. To the extent possible, the committee expects that the procedures employed at the regional office level will continue to be employed by VA, in order to assure that claims are handled in an expeditious manner that is sympathetic to the veteran's claim. The committee believes that the existing system achieves a high degree of accuracy and fairness and intends that no changes be made to the system unless it would enhance achievement of these two goals.

LEGISLATIVE HISTORY AND PURPOSES OF THE FEE LIMITATION PROVISIONS OF 38 U.S.C. 3404 (C)

Section 3404(c) of title 38, United States Code, currently provides as follows:

> (c) The Administrator shall determine and pay fees to agents or attorneys recognized under this section in allowed claims for monetary benefits under laws administered by the Veterans' Administration. Such fees—
>
> (1) shall be determined and paid as prescribed by the Administrator;
>
> (2) shall not exceed $10 with respect to any one claim; and
>
> (3) shall be deducted from monetary benefits claimed and allowed.

38 U.S.C. 3404(c) (1982).

For all intents and purposes, these provisions have remained unchanged since 1936. However, statutes governing representation of claimants for veterans pensions, bounties, or other benefits have, for over 125 years, imposed limitations on amounts that may be paid to representatives, agents, and attorneys in connection with claims for benefits or claims for increased benefits. These limitations have ranged from no fee payable to a maximum of $25 payable and, for insurance benefits, up to 10 percent of amounts recovered.

In 1862 Congress imposed a $5 limitation on fees agents or attorneys could charge claimants in applying for a pension, bounty, or other allowance. 12 Stat. 566, 588 (1862). Two years later this limitation was raised to $10. 13 Stat. 387, 389 (1864). Since that time, at least 30 enactments have addressed the amounts that may be paid for services rendered for a wide variety of Federal benefits having a nexus to military service, including service pensions or bounties for veterans of the Civil War; pensions for soldiers and sailors incapacitated for the performance of manual labor, and for widows, minor children, and dependent parents; pensions for Civil War and Mexican War veterans; insurance benefits; and modern day compensation and pension benefits for veterans (or their survivors) of World War I, World War II, the Korean conflict, and the Vietnam era. *See generally,* Legislative History of the Ten Dollar Attorney Fee Limitation in Claims for Veterans' Benefits, Committee on Veterans' Affairs, House Committee Print No. 8, 100th Cong., 1st Sess. (1987).

Although the provisions affecting the fee limitations have varied over the years, two basic purposes have been noted. The major stated purpose has been to protect the interests of veterans from the perceived threat that agents or attorneys would charge excessive fees for their services, which essentially required only the preparation and presentation of an application for benefits. For example, one of the purposes discussed in connection with the 1862 fee limitation was "to prevent the numerous frauds committed by pension agents upon applicants for pensions" Cong. Globe, 37th Cong., 2d Sess. 2101 (1862)(Remarks of Mr. Harrison). This central purpose is consistent with the historical intent of Congress that the Government benefit sought and recovered by veterans or their survivors should inure to their benefit rather than to third parties. In fact, from a statement made in connection with a 1918 amendment to the War-Risk Insurance Act (40 Stat. 555) it is clear that the intent of legislation increasing the then-existing fee limitation from $3 to $10 was to protect veterans from the predatory practices of unscrupulous claims agents and lawyers: "It is not the intent of Congress that these mercenary claim-agent leeches should sap the blood of any financial benefit from the Government by putting up these false claims and establishing their right to this 10 per cent comission for doing nothing, and doing what the Government itself intends to do in every individual case." 56 Cong. Rec., Part 5, p. 5222 (April 17, 1918).

Secondarily, although not as clearly defined, is the premise that, because the process for seeking veterans benefits has historically been intentionally structured as informal and non-adversarial, the assistance of paid agents or attorneys was not deemed necessary or desirable in the overwhelming majority of cases. This is evidenced by enactments which authorized and in some cases restricted representation of claimants to recognized representatives of designated service organizations. 43 Stat. 607 (1924). This premise was confirmed in the case of *Staub* v. *Johnson,* 519 F.2d 298 (D.C. Cir. 1975) (challenging the constitutionality of sections 3404(c) and 3405) as follows:

> The intent of this statutory scheme is to protect veterans from predatory fee practices by attorneys, but it also reflects a Congressional judgment that VA proceedings are non-adversary and thus retained counsel are unnecessary.

Of note with regard to representation by organizations are the current provisions of section 3402(b) of title 38, United States Code, which provide generally that no individual will be recognized as a representative of a service organization unless the individual has certified that no fee will be charged in connection with any claim for benefits. 38 U.S.C. 3402(b) (1982). In 1936 Congress enacted legislation which authorized service organizations to assist claimants as long as no fee was charged and concurrently authorized the Administrator of Veterans' Affairs to recognize agents and attorneys for such purposes, subject to the current $10 fee limitation. 49 Stat. 2031 (1936).

The limitations on amounts that may be paid for representation have withstood constitutional challenge, *Walters* v. *National Association of Radiation Survivors,* 473 U.S. 305 (1985); *Gendron* v. *Saxbe,* 389 F. Supp. 1303 (D. Cal. 1975), *affirmed,* 423 U.S. 802 (1975), but have not been without their critics. As early as 1870, concerns were expressed that the limitations on payments would make it difficult to obtain the assistance of an attorney. Cong. Globe, 41st Cong., 2d Sess. 4459 (1870)(Remarks of Mr. Thayer).

In recent years, concerns that the $10 fee limitation prevents veterans from obtaining adequate representation before the Veterans' Administration have been voiced during several hearings conducted by the Committee on the issue of judicial review of veterans' claims. *See generally, Hearings on Judicial Review of Veterans' Claims, Subcommittee on Oversight and Investigations, House Committee on Veterans' Affairs,* July 21 and 26, 1983, 98th Cong., 1st Sess., Serial No. 98-25; and *Hearings on H.R. 585 and Other Bills Relating to Judicial Review of Veterans' Claims, House Committee on Veterans' Affairs,* June 24 and 25, 1986, 99th Cong., 2d Sess., Serial No. 99-54.

JUDICIAL AND LEGISLATIVE HISTORY OF 38 U.S.C. 211(A)

As discussed previously, the courts have been called upon to decide the reviewability of decisions under statutes providing benefits to veterans since shortly after the Republic was formed. Prior to the enactment of statutes expressly precluding judicial review of administrative determinations on claims for veterans benefits, Justice Taney expressed the following view of the judicial role in such matters in the case of Stephen Decatur's widow:

> The head of an executive department of the government, in the administration of the various and important con-

> cerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress, under which he is from time to time required to act. If he doubts, he has a right to call on the Attorney General to assist him with his counsel; and it would be difficult to imagine why a legal adviser was provided by law for the heads of departments, as well as for the President, unless their duties were regarded as executive in which judgment and discretion were to be exercised . . . The interference of the Courts with the performance of the ordinary duties of the executive department of the government would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them.

Decatur v. *Paulding,* 39 U.S. 497, 10 L.Ed. 559 (1840)

Beginning with the doctrine that a suit against the United States may not be heard unless the Constitution or an Act of Congress grants jurisdiction, the Congress, when it has spoken on the issue at all, has generally precluded judicial review of decisions in claims for veterans' compensation and pension benefits. When Congress first enacted legislation allowing certain claims to be brought against the United States, it specifically exempted claims for veterans pensions, "which at the time comprised virtually the entire veterans' program." Van Dolsen, *Judicial Review of VA Actions,* at 594 (1987). The first law expressly prohibiting review was enacted in 1924 as section 5 of the World War Veterans Act, 43 Stat. 608, 609. The so-called "Economy Act of 1933", 48 Stat. 8, 9, which gave the President wholesale authority to reduce or terminate veterans' pensions, made more explicit the Congressional decision to preclude judicial review of all decisions of the Administrator "under the provisions of this title, or the regulations issued pursuant thereto." *See Hines* v. *United States ex rel.* Marsh, 105 F. 2d 85 (D.C. Cir. 1939). The Supreme Court construed the statute in *Lynch* v. *United States,* 292 U.S. 571 (1934) "to remove the possibility of judicial relief". The 1940 revision purported to be merely a restatement of the law as it then existed, *see* Van Dolsen, *Judicial Review of VA Actions* 595, fn. 99, as did the 1957 and 1958 recodifications. As interpreted in *Van Horne* v. *Hines,* 122 F. 2d 207 *cert. dened* 314 U.S. 689 (1941) (D.C. Cir. 1941), the court found that it was the intent of Congress to prohibit judicial consideration of final decisions of the Administrator pertaining to "gratuitous" benefits.

Subsequent to the 1958 recodification of title 38, United States Code, the United States Court of Appeals for the District of Columbia Circuit found an apparent gaping hole in the finality statute. Beginning with *Wellman* v. *Whittier,* 259 F. 2d 163 (D.C. Cir. 1958) and culminating in *Tracy* v. *Gleason,* 379 F. 2d 469 (D.C. Cir. 1967), the court held that the term "claim" as used in section 211(a) related only to an initial claim for veterans benefits, and did not preclude review of challenges to VA decisions to discontinue benefits. *See 1980 House Hearings* at 102–104 (statement of VA General Counsel Guy H. McMichael III). As a result of these decisions, the Congress amended section 211(a) once again in 1970 to preclude review of any decision of the Administrator "on any question of law or fact under any law administered by the Veterans' Administration." *See* P.L. No. 91-376, sec. 8(a), 84 Stat. 787, 790.

The legislative history of this amendment is traced and its meaning examined anew by the Supreme Court in the case of *Johnson* v. *Robison,* 415 U.S. 361 (1974), in which the Administrator, acting under fairly clear legislative authority, refused to provide veterans benefits to a non-veteran who had performed civilian service as a conscientious objector as an alternative to the performance of military service. The Supreme Court properly decided that a decision not to provide benefits to conscientious objectors was a decision of the Congress, not of the Administrator, and the Court was free to examine the constitutionality of Congress' decisions. It is arguable that section 211(a) was irrelevant to the Court's decision in the case, but the holding that section 211(a) was inapplicable to *Robison's* action seems clearly correct.

Following the *Johnson* v. *Robison* decision, a number of courts, beginning with the Court of Appeals for the Sixth Circuit in the case of *Wayne State* v. *Cleland,* 590 F. 2d 627 (6th Cir. 1978), have held that section 211(a) does not preclude judicial scrutiny of claims that the Administrator exceeded his authority in issuing particular regulations. In that case, the district court had held that section 211(a) was enacted to preclude review of individual benefit determinations, and that it had no applicability to the issuance of VA regulations. The Sixth Circuit's reasoning was that the judicial review provision of the APA, 5 U.S.C. 701, applied to VA rulemaking, totally ignoring the fact that matters relating to "public property, loans, grants, benefits, or contracts" are exempt from APA rulemaking requirements, 5 U.S.C. 553(a)(2). It is relatively clear that this exemption to the APA requirements was enacted because of the enormous burden which judicial review would place on the courts and the executive agencies if review of such matters were permitted. Notwithstanding this exemption and the arguable notion that the 1970 amendment to section 211(a) was intended to insulate agency rulemaking from judicial scrutiny, *see Gott* v. *Walters,* 756 F. 2d 902 (D.C. Cir.), *vacated and reh'g granted,* 791 F. 2d 172 (D.C. Cir.)(en banc), *remanded with instructions to dismiss as moot,* 791 F. 2d 172 (D.C. Cir. 1985)(en banc), the Veterans' Administration purported to "waive" the exemption by issuing a policy statement in 1972 that it would voluntarily comply with APA notice and comment rulemaking procedures. See 38 C.F.R. 1.12. Whether an agency can "waive" a statute which precludes judicial review of certain matters is a question that *Wayne State* and all of its progeny have left unaddressed.

The logic of *Wayne State* was followed in the Fourth, Eighth, and Ninth Circuits when these Circuits were confronted with similar challenges. See *University of Md.* v. *Cleland,* 621 F. 2d 98 (4th Cir. 1980); *Merged Area X (Educ.)* v. *Cleland,* 604 F. 2d 1075 (8th Cir. 1979); *Evergreen State College* v. *Cleland,* 604 F. 2d 1002 (9th Cir. 1980). The logic was rejected by the Court of Apeals for the Federal Circuit in *Roberts* V. *Walters,* 792 F. 2d 1100 (Fed. Cir. 1986), and in the 2d Circuit in *Traynor* v. *Walters,* 791 F. 2d 226 (2d Cir. 1986). This latter case was consolidated with a case decided in the District of Columbia Circuit, *McKelvey* v. *Turnage,* 792 F. 2d 194 (D.C. Cir. 1986) and decided by the Supreme Court in 1988. *Traynor* v. *Turnage,* 108 S.Ct. 1372 (1988). In that decision, the Supreme Court held that section 211(a) did not preclude judicial review of a claim that the Veterans' Administration's regulation denying certain educational benefits to petitioners on the basis of their admitted alcoholism conflicted with section 504 of the Rehabilitation Act of 1973 as amended. The court reasoned:

> The cases now before us involve the issue whether the law sought to be administered is valid in light of a subsequent statute whose enforcement is not the exclusive domain of the Veterans' Administration . . . It cannot be assumed that the availability of the federal courts to decide whether there is some fundamental inconsistency between the Veterans' Administration construction of veterans' benefit statutes, as reflected in the regulation at issue here, and the admonitions of the Rehabilitation Act will enmesh the courts in the "technical and complex determinations and applications of Veterans' Administration policy connected with veterans' benefits decisions" or "burden the courts and the Veterans' Administration with expensive and time consuming litigation". (quoting *Johnson* v. *Robison,* at 370). Of course, if experience proves otherwise, the Veterans' Administration is fully capable of seeking appropriate relief from Congress.

Traynor v. *Turnage,* slip opinion at 7–8.

The result in *Johnson* v. *Robison* is generally accepted as being in accord with a line of decisions stretching back to *Marbury* v. *Madison* which hold that the courts have a constitutional responsibility to determine whether Congressional enactments meet constitutional muster. But at least the Court in *Johnson* first decided that the words of 211(a) did not preclude judicial consideration of *Robison's* claim, since the argument was not whether the Administrator had made an unconstitutional decision, but whether Congress had done so. *Johnson* v. *Robison,* at 367.

The reported decisions of the lower courts applying the rationale of *Goldberg* v. *Kelly,* 397 U.S. 254 (1970) to VA adjudication procedures, *Plato* v. *Roudebush,* 397 F. Supp. 1295 (D. Md. 1975)(VA pension benefits), and *Devine* v. *Cleland,* 616 F. 2d 1080 (9th Cir. 1980)(VA education benefits), fit within the parameters of the Court's assertion of the power to review unconstitutional administrative action. Both of these cases reflect the Court's efforts to check allegedly unfair administrative proceedings through the creative adaptation of the due process clause of the Constitution, and both utilized the Court's reasoning in *Johnson* v. *Robison* to sanction assertions of jurisdiction, section 211(a) to the contrary notwithstanding. "Despite the dearth of case law on the issue, dicta in several cases and scholarly analysis suggest strongly that there is a constitutional right to judicial review of constitutional issues raised by agency actions." R. Pierce, S. Shapiro & P. Verkuil, ADMINISTRATIVE LAW AND PROCESS, sec. 5.2 at 128–30 (footnotes omitted). See also Breyer & Stewart, ADMINISTRATIVE LAW AND REGULATORY POLICY, at 1074–78 (2d ed., 1985).

The problem with the *Wayne State* line of cases, and indeed with the Supreme Court's decision in *Traynor,* is that it appears the courts are paying too much attention to the policy behind the enactment of 211(a) as articulated by the Court in *Johnson* v. *Robison,* and not enough attention to the explicit language that Congress used in isolating decisions of the Administrator from judicial scrutiny. As one critic has noted:

> According to Justice Brennan [the author of the Court's decision in *Robison*], a claim arises under a statute if it alleges that the statute grants someone certain rights, while it arises under the Constitution if it "seeks to hold invalid the result which would be reached under the statute itself." When a person claims that the VA has acted beyond its statutory authority, the claim is that the agency failed to award benefits as rights granted by the statute. Therefore, even under Justice Brennan's view such claims are outside the holding in *Robison.*

Van Dolsen, *Judicial Review of VA Action,* at 608.

To be sure, the *Wayne State* line of cases did not involve an individual veteran's challenge to an agency decision in his or her case. In most of these cases, there was no administrative procedure available to the colleges affected by the VA's rule other than a petition to the agency to amend the rule under 5 U.S.C. 553(e), which the agency is arguably bound to consider by virtue of its adoption of 38 C.F.R. 1.12, the VA's commitment to honor the public rulemaking procedure of the APA. However, *Traynor* and its companion cases did involve an individual's application for benefits, and the Administrator's refusal to grant such benefits under laws providing benefits to veterans. Thus, by allowing *Traynor*-type cases to proceed on the slender thread of reasoning that the VA has no special expertise in interpreting section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, the Supreme Court has endorsed judicial scrutiny of individual benefit determinations whenever an allegation is made that a decision implicates a constitutional principle or construction of a statute not codified in title 38 of the United States Code.

With all due respect to the Court's efforts to accede to the policy judgment originally made by the Congress in 1887 and ratified in 1924, 1933, 1940, and 1970, the Court's opinion in *Traynor* would inevitably lead to increased involvement of the judiciary in technical VA decision-making. Notwithstanding the fact that the language of section 211(a) is cited as the model for preclusion of review statutes, the courts seem to have little regard for the eroding effect that decisions such as *Traynor* have on the independence of the executive branch. Because courts always have "the final say" on questions of law, and because of the modern trend to make all administrative decisions reviewable, it appears that Congressional efforts to preclude certain forms of judicial review must be periodically revised. And since at present the courts have arrogated the power to determine whether the Administrator exceeds his authority, as well as whether he reached the proper legal conclusion on a given set of facts, the ineluctable result is that the courts will eventually feel free to review any challenge to the Administrator involving a question of law. While the committee believes that *Johnson* v. *Robison* was correct in asserting judicial authority to decide whether statutes meet constitutional muster, the reasoning of that case has taken the courts further into individual decision-making than Congress heretofore intended. The statement of Justice White noting that the VA is free to seek appropriate relief from Congress if VA matters begin to burden the courts with expensive and time-consuming legislation ignores the complaint of most judges (and the Judicial Conference has so testified before this committee) that the courts already have far too many cases to handle.

Discussion of Reported Bill

In deciding to what extent the courts should be involved in reviewing agency decisions, the committee believes that a useful starting point is to consider the views of members of the judiciary on this topic. The late Judge J. Skelley Wright outlined his view of the judicial role in clear and concise terms in 1979, and expressed a point of view very much in line with that of Justice Taney quoted earlier in this report. Judge Wright said:

> The most obvious case for judicial retreat [from acting as the final arbiters of the public good] is when courts are reviewing administrative action by government agencies and departments for non-constitutional error. We tend to forget that, once upon a time, it was not self-evident that judges had any business overseeing the work of departments or other agencies of government, except when it was charged that constitutional rights had been violated. I am now wondering why that is not the right rule, why courts should do more than keep administrators within constitutional bounds.
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> Some will answer: Because somebody has to police the bureaucrats and Congress has given that job to the courts. It is true, of course, that under the Administrative Procedure Act and other like statutes, federal courts are required to review administrative action for legality, as well as constitutionality. This is entirely appropriate. To confine the unelected bureaucracy within the limits fixed by the people's representatives is not judicial usurpation; it is to serve the democratic principle that fundamental policy decisions should be made by the popular branch of government.
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> The claim that close judicial supervision of administrators' discretion is necessary, however, is questionable. Of course, there are today more bureaucrats, with more power, than ever before. But the legislative practice of investing officials with fairly broad discretion to "get on with the job" is hardly new. A century and a half ago the Supreme Court had occasion to say:
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> A practical knowledge of the action of any one of the great departments of the government, must convince every

person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show a statutory provision for every thing he does. No government could be administered on such principles. To attempt to regulate, by law, the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the government.

United States v. *MacDaniel*, 32 U.S.(7 Pet.) 1, 13–14 (1833).

This remains true. The difference is that today the courts are constantly asked to supervise administrators acting under such broad delegations. I wonder whether the judges have not responded too enthusiastically to the invitation. Indeed, it is not clear how far it is, or can be made, the duty of the federal courts to review administrative decisions for non-constitutional error.

Surely, Congress cannot insist that an Article III court should "screen" agency rules, regulations, or decisions before they take effect, or thereafter, in the absence of a specific "case or controversy." Nor, presumably, does the constitutional principle of separation of powers permit the courts, even at the request or direction of the legislative branch, to exercise a policy veto over the acts of the bureaucracy. Yet, in all but name, that is what often occurs, with Congressional acquiescence. I am not at all sanguine about the constitutional propriety of courts reviewing administrative action for "abuse of discretion," except when the "abuse" amounts to arbitrariness or discrimination in violation of the Constitution. As Mr. Justice Frankfurter once wrote, "The Framers . . . did not make the Judiciary the overseer of our government."

As for the appeal to democratic theory as the reason for having courts supervise the agencies and departments of government, I reject it utterly. It is all too true that unelected bureaucrats are often left at large to govern under legislative mandates that embody no clear directive and few restraints. But this is no justification of unelected judges to supply the missing guidelines and test agency action accordingly. To the extent that a bureaucrat—or indeed the President—is acting without statutory authority, or plainly contrary to statute, the action is unconstitutional and, when their jurisdiction is properly invoked, it is the duty of courts to intervene. But judges do not have a roving commission as agents of the Congress to oversee the implementation of legislation by the bureaucracy.

On the contrary, insofar as Congress has permissibly delegated its legislative prerogatives to an administrator, the

> latter is entitled to the deference due the elected legislator, whose decisions the courts review only for constitutionality. The same principle holds for the agents of the elected President. As I have elsewhere suggested, the time may be ripe to revive the doctrine that condemns excessive delegation of legislative power. Some contemporary legislation may well overstep permissible bounds in purporting to leave the making of laws to others. The courts perhaps may properly entertain that constitutional question. But when the agency is acting under a valid statute and does not itself offend the Constitution, it is not obvious why the judge's task is not at an end.
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> If the judiciary were to limit its review to constitutional error, it would hardly leave the bureaucracy unchecked. We need only remember that the primary authority which federal courts have over state governmental action is to insist on conformity to the Constitution, and no one complains that the weapon is too weak or the standard too lax. Why is it necessary to review federal agency action more stringently? To be sure, in federal cases courts tend to avoid reliance on the Constitution and to fault the agency for acting beyond statutory authority or for reaching its decision by a process inconsistent with the statutory mandate. But, in many cases, the same result would follow even if conformity to the Constitution were the only criterion. Adversely to affect the liberty or property of citizens without being so authorized by law is, after all, to break the first commandment of our constitutional system, which ordains a "government of laws, not men." So, also, whether or not the statute says so, the due process clause imposes restraints on how decisions are made. And, of course, the Constitution itself—independently of the Administrative Procedure Act or any other law—forbids governmental action that is obviously arbitrary, capricious, or discriminatory.
>
> Yet, agencies are often faulted for alleged deficiencies that no one would label constitutional. Those are precisely the cases about which I have doubts. If judges approached the review of agency action wearing only a "constitutional hat," they would be more restrained. And they would be on firmer ground when they did intervene. It would do no harm if the federal courts were to start from the premise that they could fault administrators only for constitutional error, at least pausing before going beyond that point. I suspect this habit, if generally followed, would help restore the balance between the judiciary and the popularly elected branches of government.

Wright, *Judicial Review and the Equal Protection Clause,* 15 Harvard Civil Rights—Civil Liberties Law Review 1 (1980).

The committee is concerned with restoring the proper balance between the executive and judicial branch with respect to the adjudication of veterans' claims. It is clear from the testimony before the committee that judges do not wish to take on the very technical and specialized task of applying a well established body of law governing the adjudication of veterans' claims to thousands of factual disagreements which arise between the VA and claimants. The committee also notes that at times courts alternate between doctrines that give appropriate deference to administrative fact-finding processes and doctrines that call for strict scrutiny or a hard look at difficult factual situations. This is especially true when the review of factual determinations is precluded, but takes place in any event on the premise that the question is a "mixed" question of law and fact. The committee believes that there is a harmful effect which results from inconsistency in the level of deference given to administrative fact-finding, for it defeats the goals of accuracy and fairness if courts do not adhere to a strict standard of deference. As Judge Wright put it, "fundamental policy decisions should be made by the popular branch of government". Thus, when one branch, the "popular" branch, entrusts the administration of veterans benefits to the Executive's discretion, Judge Wright believes that the Executive is entitled to the deference due the elected legislator. The committee might add that decisions of the Administrator deserve the respect of the judicial branch, even when that branch views such decisions as dubious or unwise. It is only through such deference that the three branches of government can continue to coexist.

In light of the committee's long history of consideration of permitting court review of VA benefit decisions, it is relatively clear that the Committee views with approval most of the procedures adopted by the VA to adjudicate claims. Time and again, in both Republican and Democrat administrations, whether supported or opposed by veterans' organizations, the committee has rejected legislative proposals to permit wider judicial review of VA decision-making. However, as indicated previously, the committee has continually examined the procedure and substance of VA decisions in order to determine whether the goals of accuracy and fairness were being met, and when appropriate, has reported legislation designed to increase the VA's ability to achieve these goals. This bill is a continuation of that long tradition.

In reporting this legislation, the committee has strived to maintain many of the valuable features of the existing VA system. Professor Paul Verkuil, president of the College of William and Mary and a noted expert in the field of administrative law, in his testimony before the committee, characterized the VA system as "informal, efficient, and fair . . . Indeed, when one considers the declared pro-claimant bias of the agency, it is surely one of the most generous benefactory agencies in the world."

One of the most valuable features of the present VA system is the participation of unpaid veteran service organization representatives in every aspect of the VA benefits system. Professor Jerry Mashaw of Yale University described it during the 1986 hearings in the following terms:

> The VA operates in the context of continuous Congressional oversight and massive case work. It is permeable on a daily and individual basis by service organizations and

> state agencies who represent veterans. Indeed, given the integration of service reps into the ordinary operations of the VA adjudicative porocess, I would describe it as the most open social welfare bureaucracy in the United States that administers a massive program.

Accurate, informal, efficient, and fair. These are the goals which have guided the committee in reporting a bill expanding judicial review of VA decision-making. However, achievement of these goals is no longer solely the function of the executive branch, with an occasional nudge from the Congress. By allowing courts to review VA policy, the Congress is entrusting the courts with an important responsibility. If as a result of the enactment of this legislation, the perception of the VA system is that it has become inefficient, formalized, and unfair, and accuracy in decision-making becomes a fortuitous event rather than a consistent one, veterans will bear the burden of the change. The committee has always been mindful of this possibility, and trusts that courts are no less aware of the vital interests which are at stake.

In order to preserve as much of the informal and pro-claimant bias of the existing VA claims procedure as possible, the committee has avoided taking any action to disturb existing procedures governing the handling of claims at VA regional offices. Moreover, the committee bill would discourage the adoption of more formal procedures at this level by prohibitting attorneys from charging fees for representation before the regional office affirms its intention to deny a claim by issuing a statement of the case.

The committee bill would also codify several existing rules in order to reassure veterans that no change in those rules should be implied by other portions of the reported bill. The substitution of a court to perform the functions presently performed by the BVA is not intended to express displeasure with the existing BVA method of reviewing claims or to imply that the existing review process is unfair. To the contrary, the committee believes that veterans presently receive every possible consideration when the BVA reviews a case, and the committee expects that the new court will be similarly inclined. The creation of a court is intended to provide a more independent review by a body which is not bound by the Administrator's view of the law, and that will be more clearly preceived as one which has as its sole function deciding claims in accordance with the Constitution and the laws of the United States.

To the extent that the committee bill allows Article III courts to review VA policy as expressed in VA regulations and interpretations by the General Counsel, the committee has relied on the analysis of learned scholars that such review will aid in the achievement of a more accurate and fair system. *See generally* R. Fallon, *Of Legislative Courts, Administrative Agencies, and Article III,* 101 Harv. L. Rev. 916 (1988).

SECTION-BY-SECTION ANALYSIS OF REPORTED BILL

Section 1.—Provides that the bill may be cited as the "Veterans Judicial Review Act".

Section 2.—Would amend section 211 of title 38 in order to clarify certain questions and resolve debates surrounding the wording of this section as presently written. As revised, the first sentence of section 211 imposes a duty upon the Administrator to resolve all legal and factual questions which are necessary to a decision in a case. Thus, if a veteran alleges that a statute is unconstitutional, that VA procedure deprives him or her of due process of law, or that a VA regulation is inconsistent with a later-enacted statute, the Administrator must take a position with respect to such a contention if it is necessary to a decision in a case. By requiring the Administrator to rule on such challenges, the Administrator is fairly apprised of a matter which may become the subject of further judicial review and may reformulate or clarify the position of the agency on the particular question.

The present wording of section 211(a) speaks of "decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans". This language has prompted debate about whether a particular decision arises in the administration of a statute providing benefits to veterans. To clarify Congressional intent, the revised section 211 addresses itself to decisions "under a law affecting the provision of benefits". The effect of this change is to broaden the scope of section 211, so that if, for example, the Administrator were to make a decision that a law precluding the provision of benefits to certain veterans did not conflict with another law prohibiting discrimination against disabled persons, that decision "affects" the provision of benefits to such persons and could only be reviewed in accordance with the provisions of section 223 or chapter 71. Similarly, a challenge to the validity of a VA regulation, such as the "seat time" rule involved in the *Wayne State* case, would have to be initially decided by the Administrator. In addition to the reasons cited above for making this change, it conforms to basic administrative principles that a reviewing court ought not to be put in a position where it has no idea of an agency's views on a particular legal question. Moreover, the law should encourage agencies to resolve disputes such as those cited administratively without court intervention, since the agency is in the best position to understand the effect of a changed position and to make the most informed decision on the best means of implementing any change in its position.

The rest of the changes to section 211 are proposed merely to make the section easier to read, and do not have substantive effect.

Section 3.—Imposes certain responsibilities on the Administrator with respect to agency rules and interpretations of agency authority. The Veterans' Administration has voluntarily committed itself, albeit under pressure from the Administrative Conference and others, to compliance with the advance notice requirements of the Administrative Procedure Act. Furthermore, the agency has issued regulations, *see* 38 C.F.R. 1.550 *et seq.*, implementing the publication and access to information requirements of the APA (commonly referred to as the Freedom of Information Act). While there has been some debate about the reviewability of agency rulemaking, *see*

Gott v. *Walters, supra,* and the articulated rationale of the Sixth Circuit in the *Wayne State* case favoring such reviewability has been strongly criticized, *see Traynor* v. *Walters,* 791 F. 2d 226 (2d Cir. 1986), *reversed sub nom. Traynor* v. *Turnage, supra,* and Van Dolsen, *Judicial Review of VA Actions,* at 617, the committee does not have any further objection to judicial scrutiny of the grounds for the issuance of VA rules.

Some apprehension has been expressed that the VA schedule for rating disabilities issued pursuant to 38 U.S.C. 355 would be destroyed by piecemeal review of individual rating classifications. Notwithstanding the deference which courts tend to give to longstanding administrative constructions, *see Alcoa* v. *Central Lincoln Peoples' Util. Dist.,* 467 U.S. 380, 390 (1984), especially one that has been consistently followed by the agency, and that has been drafted by an agency with recognized expertise in the subject matter, *see generally* Levin, *Scope-of-Review Doctrine Restated,* 38 Ad. L. Rev. 239, 267–270 (1986), the committee has expressly precluded review of the schedule in the bill (except for challenges to the constitutionality of the schedule).

By vesting jurisdiction of challenges brought under the APA solely in the Court of Appeals for the Federal Circuit, the bill deprives United States District Courts of jurisdiction to hear such matters under 28 U.S.C. 1331. However, by specifying that the Court of Appeals for the Federal Circuit (CAFC) shall have exclusive jurisdiction of VA matters to which section 553 or 552(a)(1) apply, the bill leaves unaffected District Court jurisdiction of other disputes arising under section 552. The committee believes that it is strongly desirable to avoid the possible disruption of VA benefit administration which could arise from conflicting opinions on the same subject due to the availability of review in the 12 Federal Circuits or the 94 Federal Districts. The committee also believes that the subject of veteran benefits rules and policies is one that is well suited to a court which has been vested with other types of specialized jurisdiction.

Section 4.—Of the bill would revise the existing attorney fee limitation applicable to all proceeding affecting claims for veterans benefits. It would repeal the existing limitation of $10 on all such matters, and would replace it with a two-stage rule. Generally, all representation in matters before the Veterans' Administration would have to be undertaken without the payment of any fee whatsoever. As proposed to be revised, section 3404(c) would prohibit the charging or payment of any fee for services rendered at any time prior to the time that the Administrator issues a statement of the case under section 4015 of title 38. The agency normally only issues a statement of the case after thoroughly and carefully reviewing the record of a claim. Although in some cases the VA grants benefits sought after a statement of the case has been issued, by prohibiting an attorney or agent from charging for services until the VA affirms its decision to deny a claim, the committee intends to preserve as much of the informal and efficient means of claim adjudication as possible. In this connection it should be noted that the committee bill would not require the VA to use any particular means to adjudicate a claim; the VA is expressly encourage to preserve its informal, non-adversarial procedures.

Under the committee bill, once the VA issues a statement of the case, a claimant and a lawyer are free to negotiate whatever fee they choose. While some proposals called for a dollar or a percentage limitation on the amount of such fees, the committee bill rejects these proposals. It appears that the limitations contained in these proposals are similar to limits applicable in Social Security proceedings. The committee has no knowledge as to whether these limitations discourage excessive fees, and believes that such limitations would be derided as arbitrary were it not for the fact that at present the law allows virtually no fee in VA cases. The committee is not unmindful that an occasional unconscionable agreement between an attorney and a client may escape the attention of the appropriate disciplinary arm of a bar association, so it has chosen, in proposed section 4012 (discussed below), to require the Court of Veterans Appeals to review each fee agreement. The Court is authorized to reduce the fee called for if it finds that the fee is excessive or unreasonable. A similar authority is provided to the Administrator as to proceedings before the VA after issuance of a statement of the case. The language of this section provides explicitly that no fees may be charged for any services rendered prior to the issuance of the statement of the case. The committee plans to closely oversee the implementation of this provision.

Section 4(b) is a conforming amendment which would update the criminal penalty provision for violation of the prohibition on charging fees to make it clear that such a violation is a misdemeanor.

Section 5.—Would amend chapter 71 of title 38, United States Code, pertaining to the Board of Veterans' Appeals. It would replace the existing Board of Veterans' Appeals (BVA) with a new Court of Veterans Appeals (CVA). The committee has studied carefully the provisions of law providing for the establishment of the United States Tax Court and has drawn on the law establishing that Court , Int. Rev. Code of 1986 § 7441 *et seq.*, as a model for the CVA. The discussion which follows is keyed to the proposed new section numbers in chapter 71.

Section 4001 would establish the United States Court of Veterans Appeals under the authority vested in the Congress under section 8 of Article I of the Constitution.

Section 4002 would provide that the CVA would have exclusive jurisdiction to consider all questions involving benefits under laws administered by the VA. This language is drawn from existing law (38 U.S.C. 4004(a)), but is slightly broader in that it does not limit the CVA's authority to matters involving "claims". The purpose of the elimination of the phrase "on claims" is to avoid any possibility that courts will misconstrue the CVA's authority, as was done in the *Tracy* line of cases arising in the D.C. Circuit and discussed earlier in this report, and limit its exclusive jurisdiction to matters related to "claims for benefits" as that term was construed by the D.C. Circuit prior to the 1970 amendment to section 211(a) of title 38, United States Code. The committee notes the existing BVA regulation restricting its consideration of medical determinations (38

C.F.R. 19.3) and does not intend a change in this policy by adopting the slightly broader language.

The only review of decisions by the Court of Veterans Appeals would be that permitted by the procedure set forth in proposed section 4042, which provides that appeals of decisions of the CVA may be made to the Court of Appeals for the Federal Circuit. However, neither the CVA nor any other court has any jurisdiction to review the schedule of ratings for disabilities issued under 38 U.S.C. 355 or any action of the Administrator in adopting or revising that schedule. In the event that a constitutional question arises concerning the rating schedule, it must be resolved in accordance with the procedure envisioned in this chapter, since district courts would no longer have jurisdiction to entertain challenges to the constitutionality of any matter affecting veterans benefits. A determination by the CVA as to any factual matter may not be reviewed in any other court, nor may the application of the law to a particular factual circumstance be reviewed.

Section 4003 would limit the number of judges of the CVA and require the Senate to confirm the nomination of each person nominated to serve on the CVA. The President would be required to nominate persons solely on the basis of the person's qualification and ability to perform the duties of a judge of the CVA. A person nominated would be required to be a member of the bar of a Federal court or of the highest court of a State, which includes the District of Columbia and Puerto Rico under 38 U.S.C. 101(20). The CVA would consist of the chief judge, two deputy chief judges, and not more than 62 associate judges. The chief judge and the two deputy chief judges would be appointed to office for 15 year terms, while the associate judges would be appointed to ten year terms.

Under the committee bill, the chief judge would be the principal officer and head of the court, while the two deputies would perform such functions as the chief judge shall assign. These three officials would be entitled to receive compensation at the rate in effect for judges of the district courts of the United States. The associate judges would be eligible for compensation at a rate not to exceed the rate for positions at Level IV of the Executive Schedule.

In order to enhance the independence of the Court, the bill contains restrictions on the President's authority to remove a judge appointed to the Court of Veterans Appeals. A judge could not be removed except for misconduct, neglect of duty, engaging in the practice of law, or because of physical or mental disability. Before a judge may be removed, he or she shall be provided with notice of the proposed grounds for removal and an opportunity to be heard, in such manner as the Court may by rule provide, and to respond to the charges. Once removed from office, the individual would not be eligible to practice before the Court.

Proposed section 4004 deals with the organization of the Court. The chief judge would be authorized to assign cases to single judges or to a panel of not less than three judges. Currently, the Board of Veterans' Appeals decides cases using only panels of Board members. A majority of the judges of a panel shall constitute a quorum for conducting business, and a majority of the judges of the Court shall constitute a quorum for the transaction of business.

Proposed section 4005 designates the District of Columbia as the site for the principal office of the Court, and authorizes the Court to sit at any place in the United States.

Proposed section 4006 would permit the chief judge to prescribe the times and places of sessions of the Court with a view to affording reasonable opportunity to veterans to appear before the Court with as little inconvenience and expense as practicable. It is the committee's understanding that the Tax Court conducts hearings in 80 cities throughout the country in order to implement a similar mandate in its organic statute. Given the evidence of higher allowance rates when a case is heard locally by a traveling section of the existing BVA, the committee expects the Court to seek and obtain adequate funds to permit it to conduct a similar nationwide hearing schedule.

Proposed section 4011 would allow the CVA to impose a fee not to exceed $50, for the filing of any petition with the Court. The Court would be authorized to waive the fee in the case of a person who demonstrates that payment of the fee would impose a hardship. The committee expects the Court to issue rules concerning the waiver authority which would grant automatic waivers to persons whose income is below that of a person eligible for VA pension benefits. The fee payments would offset in part the cost of the new Court, and would discourage frivolous appeals.

Proposed section 4012 would require the General Counsel of the Veterans' Administration to represent the Administrator before the CVA. It would authorize the Court to establish rules governing the admittance of persons representing petitioners to the Court, but the Court could not establish a rule requiring persons to be members of any profession in order to practice before the Court. Given the quality of representation of veteran service organization representatives who presently appear before the BVA, the committee believes that many of these persons would be qualified to represent petitioners before the CVA.

This section would also require a person who charges a fee for representing a petitioner to submit a true copy of the fee agreement to the Court at the time the petition is filed, or at such time thereafter that an agreement is entered into. The Court may review the fee agreement and may order a reduction in the fee called for if it finds that the fee is "excessive or unreasonable". An order to reduce a fee may not be reviewed in any other court. The committee expects the Court to vigorously scrutinize fee arrangements, and to reduce any fee which would result in the payment of a fee at an hourly rate in excess of rates charged by a person of comparable skill in the community in which the representative is normally employed.

Proposed section 4013 authorizes the CVA to prescribe rules of practice, procedure, and evidence. The committee expects the CVA to adopt many of the existing BVA rules, which are informal and respect the fact that many persons appear before the BVA without any trained representative. In issuing its rules, the committee expects that the CVA will fully explain and justify any major departure from existing BVA rules. This section would also authorize the serving of all notices, pleadings, decisions, orders, or process by certified or registered mail.

Proposed section 4014 authorizes the Court to administer oaths and to examine witnesses. It would also authorize a judge to issue a subpoena requiring the attendance and testimony of witnesses and the production of all necessary documents. A judge would also be authorized to issue a subpoena requiring a person to give a deposition.

This section includes provisions designed to restrict the issuance of subpoenas on VA employees except upon a showing of good cause. The committee expects that an application for such a subpoena will be closely examined before it is issued. In most instances, the committee expects that the CVA will be forced to hold a hearing to determine the need for the testimony of the VA employee. The doctrine of official immunity for discretionary actions of a government employee is based on the fact that if an official could be called to answer in a court for every decision which that official made, the entire process of executive decision-making would soon grind to a halt. In a similar vein, VA employees who are authorized to make decisions on claims for benefits should not be subjected to interrogation about the thought process which led them to deny a veteran's claim, nor should VA physicians be forced to suspend the treatment of veterans in order to testify about the process used in examining an applicant for VA compensation benefits. In each case, a document exists which would explain the conclusion reached; in the case of the adjudicator or rating board member, the decision is subject to review by the Court and any error can be corrected by the Court; in the case of a physician's examination report, it may be challenged by other competent medical evidence. In both cases, the committee sees no need to subpoena the respective VA employee, and would expect the Court to deny an application for a subpoena for such purpose.

This section would also authorize the Court to exercise normal judicial powers to punish any person who is found to be in contempt of its authority. It would authorize the United States Marshall in the district in which the Court is sitting to attend any session of the Court at the Court's request.

Section 4015 would prescribe a procedure for the filing of a notice of disagreement with a VA decision and an appeal to the CVA. Much of this section is drawn from existing section 4005 of title 38, United States Code, although there are several minor differences and a number of wording changes to increase the section's readability. The petitioner would initiate review by the Court by filing a notice of disagreement in accordance with the regulations of the VA. The notice would be filed with the office or activity (referred to as the "agency of original jurisdiction") which made the decision with which the petitioner disagrees. The notice of disagreement (NOD) would have to be in writing and be filed within 180 days of the decision, except in simultaneously contested claims where two or more persons are claiming a benefit which the agency may only award to one. The VA and the Court would be required to adopt appropriate procedures to expedite decisions on simultaneous claims in order to assure a prompt and fair decision. If the petitioner does not file the NOD within the time prescribed, the VA decision becomes final.

If a timely NOD is filed by the petitioner, the agency of original jurisdiction must promptly decide which of several alternative responses it will make to the NOD. It can decide to attempt to develop additional evidence, it may reconsider its initial decision, or it can schedule a hearing at which the petitioner may meet face to face with a VA employee and discuss the basis for the claim and the agency's decision. If the disagreement is not resolved, or if the petitioner does not notify the agency in writing that the NOD is withdrawn, the agency must promptly issue a statement of the case.

A statement of the case is a detailed explanation of the basis for the agency's decision. It includes a summary of the evidence pertinent to the issues in the petitioner's case, a citation to applicable laws and regulations which affect or govern the agency's decision, and an explanation of the reasons for the agency's decision. Once the statement of the case is mailed, the petitioner would have 90 days to file a formal appeal with the CVA in accordance with the rules prescribed by the Court. The Court would be authorized to extend the time for filing an appeal for good cause. The appeal must set out the errors of fact or law which the petitioner believes the agency made, and must set out the benefits sought on appeal.

The Court would be required to base its decision on the entire record, and could dismiss an appeal which does not allege a specific error of fact or law in the decision being appealed. The CVA would be authorized to remand any appeal or take such other steps as it considers appropriate if it finds that there is insufficient evidence upon which to base a decision.

Section 4016 would require the payment of witness fees to persons who are summoned to appear before the Court or to give a deposition. The fee would be the same as that paid to witnesses in courts of the United States. Witnesses for the Administrator would be paid in advance out of the general operating expenses account, while witnesses for the petitioner would be paid by the petitioner subject to rules prescribed by the Court.

Section 4017 would require the Court to give notice and opportunity to be heard upon a proceeding before the Court to the petitioner and the Administrator. The CVA would be authorized to close the hearing to the public; the testimony and argument at all hearings would have to be reported by a stenographer. The CVA would be authorized to designate employees to conduct hearings for it and to make recommendations to the Court with respect to the case. These employees would have authority to act in a manner similar to hearing officers or special trial judges, in that they could be delegated all of the Court's power except the power to actually make a decision. The committee anticipates that such employees will be utilized by the Court to assist it in meeting the demand for hearings throughout the country.

Section 4018 would require the CVA to make a decision on a petition as quickly as practicable. In cases heard by a panel of the Court, a majority vote would be sufficient to decide the case. The decision of the judge or panel would become final unless within 30 days the chief judge directs, upon motion of either party or by the Court *sua sponte,* that the case be reviewed by an enlarged panel. In such a case, the original decision is voided and would not be a part of the record. If the chief judge approves the decision or takes no action with respect to it, it becomes the decision of the Court at the end of the 30 day period beginning on the date of the report by the judge or panel. Each decision of the Court would have to separately state findings of fact and conclusions of law. However, the judge or panel would be authorized in certain case to issue oral findings of fact and conclusions of law. The committee expects that this authority will be used in cases which are uncomplicated and in which the evidence and law are relatively clear.

The CVA would be required to designate in its decision those specific records of the Government on which it relied in making its decision. The purpose of this requirement is so that the Administrator would know that such records were the basis of the Court's decision, and take appropriate steps to preserve such records in accordance with recommendations of the National Archives and Records Administration.

Section 4021 would generally provide that records and proceedings of the Court and its panels shall be public and available to the public for inspection. However, the Court would be authorized to make any provision it thought was necessary to protect confidential information. The Court would be authorized to permit the Government and the petitioner to withdraw original records or other evidence used in any proceeding before the Court. This provision would enable the Veterans' Administration to submit an original claims file to the Court for its use in making a determination with the assurance that it would be entitled to withdraw the claims file for future use in the disposition of any subsequent claim.

Section 4022 would authorize the chief judge of the CVA to designate decisions of the Court which have precedential value, and to arrange for the publication of such decisions. These publications would be evidence of the actual decision of the CVA and would be available for sale in the same manner as other public documents.

Section 4031 would authorize the Court to appoint employees in the competitive service subject to general authorities governing employees of the Executive branch. However, the Court would be free to classify positions based upon the classification of comparable positions in the judicial branch. The committee is advised that the Tax Court is often hampered in its ability to recruit and retain capable employees because of an inability to offer employment at levels comparable to the judicial branch, and therefore believes that this authority is a necessary one. This section would also provide specific authority for the Court to employ medical advisers to aid it in its consideration of appeals.

Section 4032 would authorize the CVA to make such necessary expenditures for personal service and other things as may be necessary to efficiently carry out the functions of the Court. The CVA would receive an appropriation each year which it would be obligated to account for in the normal manner.

Section 4033 would provide that fees received by the Court, except for practice fees which may be required under proposed section 4035, shall be treated as miscellaneous receipts of the Treasury.

Section 4034 would authorize the CVA to fix a fee for comparing and preparing a transcript of the record for copying any record in a case. The fee could not be in excess of the fee fixed by law for similar charges collected by district courts of the United States.

Section 4035 would authorize the CVA to impose a periodic registration fee on persons admitted to practice before the Court. The fee could not exceed $30 a year, and would be available to the Court to employ independent counsel to pursue disciplinary matters.

Section 4041 would fix the date on which a decision of the CVA becomes final. Generally, the decision would become final either when a time period for filing an appeal (either to the Court of Appeals for the Federal Circuit (CAFC) or to the Supreme Court) had expired, or upon the expiration of 30 days from the time a modified or reversed decision is rendered in accordance with the mandate of the CAFC or the Supreme Court.

A decision of the Court would become final upon the expiration of the period for filing a notice of appeal with the CAFC. If an appeal is filed, the decision would become final when the CAFC affirms the decision of the Court or dismisses the appeal, and the petitioner does not file a petition for certiorari with the Supreme Court, or 30 days after the Supreme Court denies the petition for certiorari or affirms the Court's decision. If the CAFC or the Supreme Court orders that the decision of the Court be modified or reversed, the Court's decision would become final 30 days after it issues an opinion in accordance with the reviewing court's order. Either the petitioner or the Administrator may institute proceedings to correct an order which does not conform with the reviewing court's order within 30 days of its issuance, in which event it becomes final when corrected. If the Supreme Court or the CAFC orders a rehearing, the decision of the Court would become final in the same manner as though no prior decision had been issued.

Section 4042 would authorize review of certain decisions of the CVA by the Court of Appeals for the Federal Circuit (CAFC). The CAFC would have exclusive jurisdiction to review and decide any challenge to the validity of any law, regulation or interpretation thereof that was relied on by the CVA in making a decision in an individual case. However, neither the CAFC nor any other court would be authorized to review the facts of the appeal or the application of any law or regulation to those facts unless it is alleged that a constitutional issue is presented. As in other appellate matters, the CAFC could interpret constitutional and statutory provisions to the extent presented and necessary to a decision. Review by the CAFC would be obtained by filing a notice of appeal in accordance with and during the period prescribed by rules issued by the Supreme Court.

Section 4042 would also authorize an interlocutory appeal procedure in the event that the CVA determined (1) that a controlling question of law is presented, (2) there is a substantial ground for a difference of opinion, (3) there is in fact disagreement between the Administrator and the petitioner with respect to that question of law, and (4) the ultimate termination of the appeal may be materially advanced by consideration of that question. Once a panel or a judge hearing a case alone determines that these four conditions are met, it would be required to notify the chief judge of its determination. The chief judge would be authorized to review the determination and to certify that such a question was presented. Within 10 days of the chief judge's certification, either party could file a petition with the CAFC requesting it to consider and decide the question. The CAFC has discretion to grant or deny the petition. The petition for review would not affect proceedings in the CVA unless a judge of the CVA or the CAFC orders a stay of such proceedings

In matters properly before it, the CAFC would be required to decide all relevant questions of law, and to hold unlawful and set aside any statute or regulation or interpretation thereof that was relied upon by the CVA which the CAFC finds to be—

(1) contrary to constitutional right, power, privilege, or immunity;

(2) in excess of statutory jurisdiction or authority;

(3) without observance of procedure required by law; or

(4) resting upon a policy judgment, reasoning, or factual premise so unacceptable as to render the matter arbitrary or capricious. The CAFC would be prohibited from reviewing or altering any factual determination made by the CVA or the Administrator, or reviewing the application of any law or regulation to those facts, unless there is presented a constitutional issue. In stating the grounds for reversal of the CVA's legal conclusions, the committee has attempted to clarify the APA statement of grounds for reversal. In doing so, it has relied upon the restatement of the APA scope of review doctrine published by the Administrative Law Section of the American Bar Association. *See* Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report,* 38 Adm. L. Rev. 239 (1986). The stated goal of this restatement is to "bring the greatest coherence and internal harmony to judicial review doctrine as a whole", *id.* at 240, a goal which the committee shares. In omitting certain of the grounds for reversal included in the restatement, the committee attempted to be more concise and to take account of the fact that in the case of review of CVA decisions, factual determinations and so-called "mixed" questions of law and fact are not subject to review at all. The CAFC would have the power to affirm, modify, or reverse the decision of the CVA. If the CVA's decision is modified or reversed, the CAFC

would be required to remand it for a rehearing and new decision.

Rules for review of decision of the CVA by the CAFC would be those prescribed by the Supreme Court in accordance with section 2072 of title 28. Both the CAFC and the Supreme Court would be authorized to impose damages in a case in which a notice of appeal of the CVA decision was filed merely for delay.

Section 6.—Of the bill would amend chapter 51 of title 38, which contains general administrative provisions, by adding a new subchapter which contains sections regarding a veteran's right to reopen his or her claim upon presentation of new and material evidence; authorizing the Administrator to obtain independent medical opinions in certain instances; and codifying the concepts of burden of proof and benefit of the doubt in favor of the veteran.

New section 3031 authorizes the Administrator, upon a claimant's presentation of new and material evidence, to review any prior decision affecting the claimant with respect to benefits under laws administered by the Veterans' Administration and provides that any such review will be conducted in accordance with regulations the Administrator shall prescribe. This section is similar to current section 4004 and codifies current Veterans' Administration practices regarding reopening of claims. It is not intended to alter the treatment presently being afforded to claimants seeking to reopen their claims. The committee believes that codification of this right and authority is an important safeguard to veterans.

New section 3032, in subsection (a), authorizes the Administrator, when it is determined that expert medical opinion in addition to that already available within the Veterans' Administration is warranted either by the medical complexity or controversy involved in a pending case, to obtain an advisory opinion from outside medical experts. Subsection (b) directs the Administrator to make necessary arrangements with recognized medical schools, universities, or clinics to provide these opinions. It further states that the selection of the expert or experts shall be made by an appropriate official of the institution concerned. The authority granted the Administrator under this section is identical to that provided under current law to the Board of Veterans' Appeals under the provisions of section 4009 of title 38, United States Code. The committee believes that, by conferring this authority on the Administrator, those veterans whose claims involve complex or controversial medical issues will have the added benefit of the advice of outside medical experts to insure that the issue in question receives a thorough and totally objective review by an individual who is an acknowledged expert in the particular field and who is not an employee of the Veterans' Administration. The committee further believes that there is no point in delaying the request for such independent medical opinions until the matter is before the Court, and that this change will allow for earlier resolution of such matters.

New section 3033, in subsection (a), states that a person who is a claimant for benefits under laws administered by the Veterans' Administration has the burden of submitting evidence in support of his or her claim that is sufficient to justify that the claim is well grounded. It directs the Administrator to assist the claimant in developing facts pertinent to the claim and states that such assistance shall include requesting information from the heads of other agencies for purposes of determining eligibility for, or amount of, benefits or verifying other information regarding such benefits.

Subsection (b) of the new section provides essentially that, when all evidence and material of record regarding a claim for benefits has been considered and thereafter an approximate balance exists between the positive and negative evidence regarding the merits of a material issue, the benefit of the doubt in resolving such issue shall be given to the claimant. It further specifies nothing therein shall be construed as shifting the burden of proof from the claimant to the Administrator. The purpose of this provision is to codify the existing concept of reasonable doubt currently existing in 38 C.F.R. 3.101. The committee expressly states its intention that the codification of this concept shall in no way alter the current interpretation of the existing VA regulation or concept.

Section 7.—Of the bill provides for the transfer of current personnel and all assets of the Board of Veterans' Appeals to the Court of Veterans Appeals to facilitate a smooth transition of the functions and responsibilities of the Board to the Court. Subsection (a) transfers the personnel employed by the Board, as well as the assets, liabilities, contracts, property records, and unexpended balances of appropriations, authorizations, allocations, and other funds employed, used, held, arising from, available to, or made available to the Board to the Court.

Subsection (b) provides that the transfer of Board personnel will be made in accordance with applicable laws and regulations relating to the transfer of functions, but prohibits reductions in classification or compensation of personnel for a period of one year following transfer to the Court.

Subsection (c) limits use of unexpended funds transferred to the Court to the purposes for which they were originally authorized and appropriated.

Subsection (d) provides that any matter pending at the Board of Veterans' Appeals on the day prior to the effective date of this Act will be transferred to the Court for its consideration.

Section 8.—Provides for the initial appointment of judges to the Court of Veterans Appeals. Subsection (a) requires the President to appoint a chief judge of the Court before making any other appointments of a deputy chief judge or associate judges. The section further provides that the President must submit a nomination for appointment of the Chief Judge by April 1, 1989. The committee desires that the nomination and Senate confirmation of a chief judge occur at the earliest feasible time after the enactment of this Act and, to insure that such nomination is made at least 60 days prior to the effective date of the provisions establishing the Court, a deadline of April 1, 1989 is imposed on the President. The committee further believes that the early appointment of a chief judge will allow for valuable input of such chief judge in the appointment process of the remaining members of the Court.

Subsection (b) provides for the staggering of initial appointments of the deputy chief judges and the associate judges as follows: One of the two deputy chief judges will be appointed for a period of seven years, one third of the associate judges will be appointed for a term of four years, one third of the associate judges will be appointed for a term of seven years, and one-third will be appointed for a term of ten years. The committee believes that, by staggering the appointments of these judges in this manner, a greater degree of continuity can be achieved and that a wholesale change in the makeup of the Court will be prevented.

Subsection (c) authorizes the appointment of judges of the Court prior to the effective date of the Act to permit early action by the President in the nomination process in order that the judges of the Court may be in place on June 1, 1989.

Section 9.—Sets forth effective date provisions under the Act. Subsection (a) states that the Act shall take effect on June 1, 1989. The committee believes that a sufficient lead time must be provided in order for the smooth transition of the present Board of Veterans' Appeals to the Court of Veterans Appeals to occur.

Subsection (b) provides that the provisions of this Act will apply in the case of a petitioner who files a notice of disagreement with the Veterans' Administration with respect to a claim on or after the date of enactment of this Act. It further provides that the Board of Veterans' Appeals may not hear or decide a matter with respect to which a notice of disagreement is filed with the VA on or after the date of enactment. The committee believes that these provisions will enable appellants to pursue their appeals without disruption or delay and that the Board of Veterans' Appeals will not be encouraged to summarily dispose of any such appeals prior to such date to avoid the effects of this Act, nor will the Court or the VA be overrun with new appeals which have been held back by claimants who desire to have their appeals determined in accordance with the new provisions.

Subsection (c) states that the amendment made to section 3404(c) with respect to payment of attorney fees shall apply with respect to services performed after the effective date of the Act. This section clarifies that negotiated fees are payable only for services rendered after June 1, 1989. This will permit the Court of Veterans Appeals an opportunity to review any applicable fee arrangement entered into by a veteran and an attorney or agent. It also clarifies that attorneys who have rendered services prior to such date remain subject to the existing $10 fee limitation for such services.

OVERSIGHT FINDINGS

The committee has received a report entitled "Investigation of Disability Compensation Programs of the Veterans' Administration" from the Committee on Government Operations (House Report 100-886, August 18, 1988, 100th Congress, 2d Session).

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

The Committee received the following letter from the Congressional Budget Office on the reported bill:

CONGRESSIONAL BUDGET OFFICE
U.S. CONGRESS
WASHINGTON, D.C. 20515

September 15, 1988

Honorable G. V. Montgomery
Chairman
Committee on Veterans' Affairs
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

The Congressional Budget Office has reviewed H.R. 5288, the Veterans' Judicial Review Act, as ordered reported by the House Committee on Veterans' Affairs, September 15, 1988.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

James L Blum

James L. Blum
Acting Director

cc: Honorable Gerald B. H. Solomon
Ranking Minority Member

CONGRESSIONAL BUDGET OFFICE
COST ESTIMATE

September 15, 1988

1. BILL NUMBER: H.R. 5288

2. BILL TITLE:

Veterans' Judicial Review Act.

3. BILL STATUS:

As ordered reported by the House Committee on Veterans' Affairs, September 12, 1988.

4. BILL PURPOSE:

To provide an improved system of review of Veterans Administration (VA) decisions with respect to claims for veterans' benefits and for other purposes.

5. ESTIMATED COST TO THE FEDERAL GOVERNMENT:

(By fiscal years, in millions of dollars)

	1989	1990	1991	1992	1993
Estimated Authorization Level	1	1	1	1	1
Estimated Outlays	1	1	1	1	1

The cost of this bill would fall in budget function 700.

Basis of Estimate

Two provisions of this bill would have the potential to impact significantly on the federal budget. Section 5 would abolish the existing Board of Veterans Appeals (BVA) and would establish in its place a Court of Veterans Appeals. The new court would have the authority to review all questions of law and fact pertaining to VA decisions.

(By fiscal years, in millions of dollars)

	1989	1990	1991	1992	1993
Estimated Authorization Level	1	1	1	1	1
Estimated Outlays	1	1	1	1	1

The costs attributed to section 5 result from the difference between the salary levels currently paid to the Chairman and members of the BVA and those specified in the bill for the judges of the new court. Because the responsibilities of the

Court of Veterans Appeals would be nearly identical to those of the BVA, it was assumed that the salaries and expenses of the staff of the new court would not be significantly different from those of the BVA.

In addition, H.R. 5288 would allow review by the Court of Appeals for the Federal Circuit of disputed rule making actions of the VA. Individual benefit decisions, however, could not be appealed beyond the Court of Veterans Appeals.

It is not possible to estimate with any precision the cost of this provision, because the number of likely challenges to VA rules and regulations is unknown. According to the litigation staff of the Social Security Administration (SSA), they have a very small number of such challenges each year. However, since VA regulations have never before been subject to challenge, the number of VA cases in the first few years after enactment could be significant.

In addition, the benefit costs could be substantial if certain VA regulations were overturned upon review by the court. Again according to SSA, most challenges to regulations are class actions, involving large groups of beneficiaries or potential beneficiaries. If relief is granted by the court, it applies to the entire class, and may be retroactive to the date of issuance of the regulation in question. There is, however, no way realistically to estimate such costs.

6. ESTIMATED COST TO STATE AND LOCAL GOVERNMENTS:

The Congressional Budget Office has determined that the budgets of state and local governments would not be significantly affected by enactment of this bill.

7. ESTIMATE COMPARISON: None.

8. PREVIOUS CBO ESTIMATE: None.

9. ESTIMATE PREPARED BY: K.W. Shepherd (226-2820).

10. ESTIMATE APPROVED BY:

C.G. Nuckols
for James L. Blum
Assistant Director
for Budget Analysis

INFLATIONARY IMPACT STATEMENT

The reported bill would have no inflationary impact.

AGENCY REPORTS

The Administration did not have an opportunity to submit its official views on the reported bill; however, there follows the testimony of Donald L. Ivers, the General Counsel of the Veterans' Administration, at a hearing the Committee held on September 8, 1988, on H.R. 639, H.R. 5039, S. 11 and S. 2292, pertaining to judicial review of veterans' claims:

The VA is opposed to enactment of these measures. The Agency has historically opposed legislation that would involve the courts in individual benefit determinations or otherwise complicate and lengthen the nonadversarial administrative claims process. Moreover, we are not convinced that the Board of Veterans Appeals (BVA) is in need of reform or restructuring. My testimony today will focus on our major concerns in maintaining an efficient, responsive, and equitable process for all veterans.

Summarizing the bills, H.R. 639, 100th Congress, the "Veterans' Administration Adjudication Procedure and Judicial Review Act," would provide for judicial review of individual benefit determinations in the United States district courts. Questions of fact and law would be subject to the "arbitrary-and-capricious" standard. The statutory attorney-fee limitation would be amended to allow payment of up to $500, or 25 percent of past-due benefits under a contingent-fee agreement, for representation before the Agency. Additional fees would be allowable for extraordinary circumstances. An attorney would be entitled to $750, or 25 percent of past-due benefits under a contingent-fee agreement, for representation in the courts. If the Administrator's actions are found not to be substantially justified or if special circumstances warrant, a court could award a fee to a claimant to be paid by the Government.

H.R. 5039, 100th Congress, the "Veterans' Reassurance Act of 1988," introduced at the request of the American Legion, would authorize judicial review of VA orders in the United States circuit courts of appeals. An "order" would encompass any rule, regulation or guideline, but exclude claim decisions. An attorney would be allowed a fee of up to $500, or 25 percent of past-due benefits under a contingent-fee agreement for representation before the VA, and $750, or 25 percent of past-due benefits under a contingent-fee agreement, for representation in court. The measure would also establish a new United States Board of Veterans' Appeals, with authority to set aside any rule, regulation, policy, or interpretation of law that it finds to be unconstitutional or contrary to law.

S. 11, 100th Congress, the "Veterans' Administration Adjudication Procedure and Judicial Review Act," would authorize judicial review in the U.S. courts of appeals of final BVA decisions and challenges to rules and regulations adopted by the Administrator. Questions of law would be reviewable and the courts could set aside findings of fact "so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result if such finding were not set aside." For representation before the Agency, the bill would allow attorney fees of $500 or 25 percent of past-due benefits if there is a contingent-fee agreement. Where a case is resolved favorably to a litigant by a court, S. 11 would permit payment of 25 percent of past-due benefits and, where the litigant does not prevail, attorney fees up to $750 would be allowable. Payment of fees and costs would also be authorized under the Equal Access to Justice Act, 28 U.S.C. § 2412(d). Finally, the bill would repeal the provision of law making the BVA Chairman directly responsible to the Administrator, prohibit the awarding of bonuses to Board members, and limit the tenure of the Board Chairman and members.

S. 2292, 100th Congress, the "Veterans' Judicial Review Act," would authorize judicial review of VA rulemaking in the U.S. courts of appeals under chapter seven of the Administrative Procedure Act, as well as judicial review of final BVA decisions on the validity of VA regulations. In the latter case, the courts could set aside regulations found to be contrary to constitutional right, power, privilege or immunity, or in excess of statutory jurisdiction, authority or limitations, short of statutory right, or resting upon a policy judgment, reasoning or factual premise so unacceptable as to render the regulation arbitrary. Attorney fees up to $500, or 25 percent of past-due benefits under a contingent-fee agreement, could be approved by the Agency, and a court could approve reasonable fees if the claimant prevails or up to $750 if the claimant is unsuccessful. Additional fees and costs would be authorized under the Equal Access to Justice Act. The bill would also repeal the statute making the Chairman of the BVA directly responsible to the Administrator and the statute making VA regulations, instructions of the Administrator, and General Counsel opinions binding upon the Board. The Board would be authorized to review the validity of Agency regulations, policies and interpretations, other than the Schedule for Rating Disabilities. Finally, S. 2292 would set fixed terms of service for the Chairman and other Board members, and prohibit the awarding of bonuses to Board members.

Our principal concern is with judicial review of VA benefit decisions in the Federal courts. In the seminal case of Johnson v. Robison, 415 U.S. 361 (1974), the Court noted two important functions of 38 U.S.C. § 211(a) in precluding judicial review: To ensure that veterans' claims will not burden the courts and the VA with expensive and time-consuming litigation, and to ensure that technical and complex determinations rendered by the Agency will be adequately made and uniformly applied. 415 U.S. at 370. The Court acknowledged, however, that section 211(a) does not preclude judicial review of a constitutional challenge to a statute administered by the Agency. 415 U.S. at 367.

The courts since Robison have not definitively determined the breadth of the exception to section 211(a). For example, the Fourth, Sixth, Eighth, and Ninth Circuits have held that section 211(a) does not preclude court challenges to VA regulations as being inconsistent with the authorizing statutes. See Evergreen State College v. Cleland, 621 F.2d 1002 (9th

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Cir. 1980); Univ. of Maryland v. Cleland, 621 F.2d 98 (4th Cir. 1980); Merged Area X (Education) v. Cleland, 604 F.2d 1075 (8th Cir. 1979); Wayne State Univ. v. Cleland, 590 F.2d 627 (6th Cir. 1978). By contrast, the Fifth and Seventh Circuits have limited court access to direct constitutional challenges to VA statutes, regulations, or procedures. See Marozsan v. United States of America, No. 86-1954 (7th Cir. July 25, 1988); Anderson v. Veterans Administration, 559 F.2d 935 (5th Cir. 1977). Other circuits, such as the District of Columbia Circuit, have not had occasion to reach a decision on the scope of the exception. See McKelvey v. Walters, 792 F.2d 194 (D.C. Cir. 1986).

From a policy perspective, the VA would not object to an amendment of section 211(a) to authorize bona fide challenges to VA regulations. Such an amendment would extend the bounds of review, faithfully maintain the balance of power between the Judicial and Executive branches, and preserve the important purposes of section 211(a), i.e., utilizing the superior expertise of the Agency and avoiding burdensome and expensive litigation.

Nonetheless, there should also be a reaffirmation that Agency factfinding in individual benefit decisions and the application of law to the facts in claims are immune from court scrutiny. Judicial review of such matters would be duplicative, wasteful and inefficient.

The VA affords claimants de novo factual review by collegial bodies at both the initial and appellate stages, employing adjudicators with specialized knowledge of veterans law and medical expertise. Informal, nonadversarial hearings are provided upon request, and reasonable doubt in matters of evidence is resolved in the claimants' favor. Moreover, the Agency has instituted stringent quality control procedures to ensure the accuracy of its decisions.

Judicial review in the Federal courts would produce inconsistency and delay. It has been observed "the courts are not well equipped to determine such factual issues as whether or not an injury is service-connected or to determine other medical or technical questions, which are of a type the Veterans Administration confronts all of the time uniformly." Prepared Statement of Honorable Morris S. Arnold and Honorable Stephen G. Breyer, Administrative Office of the United States Courts, Hearing on S. 11 and S. 2292 before the Senate Committee on Veterans' Affairs, p. 17 (April 28, 1988). The courts, including the courts of appeals, tend to differ on procedural rules, evidentiary requirements, and interpretation of substantive law. Thus, judicial review in the Federal courts may be expected to yield inconsistent case law and geographically-based decisions. Predictability and consistency are essential to claimants' perception of fairness. A system that produces surprise outcomes or in which results are dependent upon where the parties reside will appear to be unjust and arbitrary.

The increase in the caseload of the Federal courts brought about by enactment of judicial review legislation would also threaten the quality and timeliness of decisions. Likening VA claims to Social Security cases, the Judicial Conference has warned:

> Because of the large numbers of criminal cases and others that have priority, the Social Security cases move very slowly through the court system, and it is not unusual to find an appeal in the court of appeals involving a claim filed five or more years prior to submission of the appeal to the three-judge panel. This delay is extremely undesirable. However, because of the heavy caseload of the courts, such delay is inevitable.

Prepared Statement of Honorable Morris S. Arnold and Honorable Stephen G. Breyer, Administrative Office of the United States Courts, Hearing on S. 11 and S. 2292 before the Senate Committee on Veterans' Affairs, p. 16 (April 28, 1988).

With regard to attorney fees, our primary concerns are that increased participation of compensated counsel at the Agency level may have a deleterious effect on the nonadversarial administrative claims system. Furthermore, the Agency should not be interjected into the essentially private relationship between clients and attorneys through monitoring, collecting, or awarding fees for professional services.

The presence of attorneys may result in an adversarial process to the detriment of all claimants. It has been observed:

> Lawyers as a class are imbued with a will to win. The formal adversary system allows, if not encourages, a win-at-all-costs attitude, all or none, pitting lawyers as paladins in combat. Unfortunately, open combat is not always in the best interest of clients or of the justice system.

Arnold I. Burns, Deputy Attorney General, U.S. Department of Justice, A View from the Department of Justice: A Colloquium on Improving Dispute Resolution: Options for the Federal Government, 1 Admin. L. J. 441, 447 (1987).

With increased attorney participation, those who retain counsel will obviously bear greater expense, and those who do not will feel the effects of the burdens and delays brought about by attorneys. Moreover, it is conceivable that such representation would eventually become the norm, regardless of whether a claimant actually needs a lawyer. The United States Supreme Court has observed:

> It is scarcely open to doubt that if claimants were permitted to retain compensated attorneys the day might come when it could be said that an attorney might indeed be necessary to present a claim properly in a system rendered more adversary and more complex by the very presence of lawyer representation. It is only a small step beyond that to the

> situation in which the claimant who has a factually simple and obviously deserving claim may nonetheless feel impelled to retain an attorney simply because so many other claimants retain attorneys.

Walters v. National Association of Radiation Survivors, 105 S. Ct. 3180, 3192 (1985).

Finally, we believe the Board of Veterans Appeals is operating well and that its members enjoy sufficient autonomy to assure independent and impartial review of appealed claims. Over the years, the Board has maintained a balance of quality, timeliness and productivity in rendering its decisions. We are unaware of any legitimate concerns that its independence has in any way been compromised by its institutional relationship with the rest of the Agency. In particular, we do not believe the proposed limitations on terms of office for Board members would in any way enhance their independence. Any who may seek reappointment may instead feel pressure to conform their decisionmaking to the expectations of those whose authority it is to have them reappointed.

The VA is strongly opposed to legislative proposals that would authorize the BVA, or any other element of the Agency, to invalidate its regulations and other precedential interpretations of VA law. It is essential that the Agency employ a coherent and consistent interpretation of the law. In the event the Board is permitted to second-guess or disregard VA regulations and their interpretation, the law applied to claims may vary depending upon the stage of adjudication; i.e., rating boards may apply different standards than the BVA. Moreover, the interpretations of law may differ significantly even among the numerous sections of the Board. In any case, reformulation of section 211(a), as noted earlier, would ensure veterans a day in court to challenge VA regulations, and thus provide for an independent review without the divisiveness or chaos that would be engendered by empowering one element of the Agency to abrogate VA regulations and other governing interpretations of law.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 38—UNITED STATES CODE

* * * * * * *

PART I—GENERAL PROVISIONS

CHAPTER	Sec.
1. General	101
3. Veterans' Administration; Officers and Employees	201

* * * * * * *

PART V—BOARDS AND DEPARTMENTS

[71. Board of Veterans' Appeals	4001]
71. Court of Veterans' Appeals	*4001*
73. Department of Medicine and Surgery	4101
75. Veterans' Canteen Service	4201
76. Health Professionals Educational Assistance Program	4301

* * * * * * *

CHAPTER 3—VETERANS' ADMINISTRATION; OFFICERS AND EMPLOYEES

SUBCHAPTER I—VETERANS' ADMINISTRATION

Sec.
201. Veterans' Administration an independent agency.
202. Seal of the Veterans' Administration.
203. Availability of appropriations.

SUBCHAPTER II—ADMINISTRATOR OF VETERANS' AFFAIRS

210. Appointment and general authority of Administrator; Deputy Administrator.
[211. Decisions by Administrator; opinions of Attorney General.]
211. Decisions by Administrator: opinion of Attorney General.

* * * * * * *

223. Rulemaking: procedures and judicial review.

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SUBCHAPTER II—ADMINISTRATOR OF VETERANS' AFFAIRS

* * * * * * *

[§ 211. Decisions by Administrator; opinions of Attorney General

[(a) On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

[(b) The Administrator may require the opinion of the Attorney General on any question of law arising in the administration of the Veterans' Administration.]

§ 211. Decisions by Administrator; opinions of Attorney General

(a)(1) The Administrator shall decide all questions of law and fact necessary to a decision under a law affecting the provision of benefits to veterans and the dependents and survivors of veterans. Except as provided in paragraph (2) of this subsection, the decisions of the Administrator as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

(2) The second sentence of paragraph (1) of this subsection shall not apply to—

(A) matters subject to section 223 of this title;
(B) matters covered by sections 775 and 784 of this title;
(C) matters arising under chapter 37 of this title; and
(D) matters covered by chapter 71 of this title.

(b) When requested by the Administrator, the Attorney General shall provide to the Administrator advice or the opinion of the Attorney General with regard to any question of law arising under the Constitution or under any law other than a law providing benefits for veterans and the survivors and dependents of veterans.

* * * * * * *

§ 223. Rulemaking: procedures and judicial review

(a) In applying section 552(a)(1) of title 5 to the Veterans' Administration, the Administrator shall take care to ensure that subparagraphs (C) and (D) of that section are complied with, particularly with respect to opinions and interpretations of the General Counsel.

(b) The provisions of section 553 of title 5 (other than subsection (a)(2) of that section) shall apply, according to the provisions of that section, to any matter relating to loans, grants, or benefits under the jurisdiction of the Administrator.

(c) An action of the Administrator to which section 552(a)(1) or 553 of title 5 (or both) refers (other than an action relating to the adoption or revision of the schedule of ratings for disabilities under section 355 of this title) is subject to judicial review. Such review shall be in accordance with chapter 7 of title 5, except that—

(1) such review may be sought only in the Court of Appeals for the Federal Circuit; and

(2) if such review is sought in connection with an appeal brought under the provisions of chapter 71 of this title, the provisions of the chapter shall apply rather than the provisions of chapter 7 of title 5.

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PART IV—GENERAL ADMINISTRATIVE PROVISIONS

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CHAPTER 51—APPLICATIONS, EFFECTIVE DATES, AND PAYMENTS

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SUBCHAPTER IV—GENERAL ADJUDICATIVE AUTHORITY

3031. Right to reopen claims.
3032. Independent medical opinions.
3033. Burden of proof; benefit of the doubt.

* * * * * * *

SUBCHAPTER IV—GENERAL ADJUDICATIVE AUTHORITY

§3031. Right to reopen claims

Upon the presentation of new and material evidence, the Administrator may review any previous determination of the Administrator with respect to benefits under laws administered by the Veterans' Administration. Any such review shall be carried out in accordance with regulations which the Administrator shall prescribe.

§3032. Independent medical opinions

(a) When, in the judgment of the Administrator, expert medical opinion, in addition to that available within the Veterans' Administration, is warranted by the medical complexity or controversy involved in a case being considered by the Veterans' Administration, the Administrator may secure an advisory medical opinion from one or more independent medical experts who are not employees of the Veterans' Administration.

(b) The Administrator shall make necessary arrangements with recognized medical schools, universities, or clinics to furnish such advisory medical opinions at the request of the Administrator. Any such arrangement shall provide that the actual selection of the expert or experts to give the advisory opinion in an individual case shall be made by an appropriate official of such institution.

§3033. Burden of proof; benefit of the doubt

(a) Except when otherwise provided by the Administrator in accordance with the provisions of this title, a person who is a claimant for benefits under a law administered by the Veterans' Administration shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded. The Administrator shall assist a claimant in developing the facts pertinent to such a claim. Such assistance shall include requesting information as described in section 3006 of this title.

(b) When, upon considering all evidence and material of record in a proceeding before the Veterans' Administration involving a claim for benefits under a law administered by the Veterans' Administration, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of the claim, the benefit of the doubt in resolving each such issue shall be given to the claimant. Nothing in this subsection shall be

construed as shifting from the claimant to the Administrator the burden specified in subsection (a) of this section.

* * * * * * *

CHAPTER 59—AGENTS AND ATTORNEYS

* * * * * * *

§ 3404. Recognition of agents and attorneys generally

(a) * * *

* * * * * * *

(c) The Administrator shall determine and pay fees to agents or attorneys recognized under this section in allowed claims for monetary benefits under laws administered by the Veterans' Administration. Such fees—

[(1) shall be determined and paid as prescribed by the Administrator;

[(2) shall not exceed $10 with respect to any one claim; and

[(3) shall be deducted from monetary benefits claimed and allowed.]

(c)(1) In connection with a case relating to benefits under laws administered by the Veterans' Administration, no fee may be charged, allowed, or paid for services of agents and attorneys with respect to proceedings occurring or services provided prior to the time the Administrator issues a statement of the case under section 4015 of this title with respect to the case in question.

(2) A person who acting as agent or attorney represents a person before the Veterans' Administration with respect to any proceeding on matters occurring after the Administrator issues a statement of the case shall file a copy of any fee agreement between them with the Veteran's Administration at such time as may be specified by the Administrator. The administrator may review such a fee arrangement and may order a reduction in the fee called for in the agreement if the Administrator finds that the fee is excessive or unreasonable. An order under this paragraph may be reviewed by the Court of Veterans Appeals.

§ 3405. PENALTY FOR CERTAIN ACTS

Whoever (1) directly or indirectly solicits, contracts for, charges, or receives, or attempts to solicit, contract for, charge, or receive, any fee or compensation except as provided in sections 3404 or 784 of this title, or (2) wrongfully withholds from any claimant or beneficiary any part of a benefit or claim allowed and due to the claimant or beneficiary, [shall be fined not more that $500 or imprisoned at hard labor for not more than two years, or both] *shall be fined as provided in title 18 or imprisoned for not more than one year, or both.*

* * * * * * *

PART V—BOARDS AND DEPARTMENTS

CHAPTER Sec.
[71. Board of Veterans' Appeals .... 4001]
71. Court of Veterans Appeals 4001
73. Department of Medicine and Surgery 4101
75. Veterans' Canteen Service 4201
76. Health Professional Educational Assistance Program 4301

[CHAPTER 71—BOARD OF VETERANS' APPEALS

[Sec.
[4001. Composition of Board of Veterans' Appeals.
[4002. Assignment of members of Board.
[4003. Determinations by the Board.
[4004. Jurisdiction of the Board.
[4005. Filing of notice of disagreement and appeal.
[4005A. Simultaneously contested claims.
[4006. Administrative appeals.
[4007. Docketing of appeals.
[4008. Rejection of applications.
[4009. Independent medical opinions.

[§ 4001. Composition of Board of Veterans' Appeals

[(a) There shall be in the Veterans' Administration of Board of Veterans' Appeals (hereafter in this chapter referred to as the "Board") under the administrative control and supervision of a chairman directly responsible to the Administrator. The Board shall consist of a Chairman, a Vice Chairman, such number (not more than 65) of members as may be found necessary, and such other professional, administrative, clerical, and stenographic personnel as are necessary in conducting hearings and considering and disposing of appeals properly before the Board.

[(b) Members of the Board (including the Chairman and Vice Chairman) shall be appointed by the Administrator with the approval of the President.

[(c)(1) Subject to paragraph (2) of this subsection, the Chairman may from time to time designate employees of the Veterans' Administration to serve as temporary members of the Board. Any such designation shall be for a period of not to exceed one year, as determined by the Chairman. An individual may not serve as a temporary member of the Board for more than 24 months during any 48-month period.

[(2) Designation under paragraph (1) of this subsection of an individual as a temporary member of the Board may not be made when there are fewer than 65 members of the Board.

[(3) In each annual report to the Congress under section 214 of this title, the Administrator shall provide detailed descriptions of the activities undertaken and plans made in the fiscal year for which the report is made with respect to the authority provided by paragraph (1) of this subsection. In each such report, the Administrator shall indicate, in terms of full-time employee equivalents, the number of temporary Board members designated under this subsection and the number of acting Board members designated under section 4002(a)(2)(A)(ii) of this title during the year for which the report is made.

§ 4002. Assignment of members of Board

[(a)(1) The Chairman may from time to time divide the Board into sections of three members, assign the members of the Board thereto, and designate the chief thereof.

[(2)(A) If a section is composed of fewer than three members as a result of the absence of a member or a vacancy on the Board or the inability of a member assigned to a section to serve on that section, the Chairman—

> [(i) may assign another member of the Board to the section;
>
> [(ii) may designate an employee of the Veterans' Administration to serve as an acting member of the Board on such section for a period of not to exceed 90 days, as determined by the Chairman; or
>
> [(iii) may direct the section to proceed with the transaction of business without awaiting the assignment of an additional member to the section.

[(B) An individual may not serve as an acting member of the Board for more than 270 days during any 12-month period.

[(3) A section of the Board may not at any time have among its members more than one individual who is a temporary member designated under section 4001(c) of this title or an acting member designated under paragraph (2)(A)(ii) of this subsection.

[(b) A hearing docket shall be maintained and formal recorded hearings shall be held by such member or members as the Chairman may designate, the associate member or members being of the section which will make final determination in the claim.

[(c) A section of the Board shall make a determination on any proceeding instituted before the Board and on any motion in connection therewith assigned to such section by the Chairman and shall make a report of any such determination, which report shall constitute its final disposition of the proceeding.

[§ 4003. Determinations by the Board

[(a) The determination of the section, when unanimously concurred in by the members of the section shall be the final determination of the Board, except that the Board on its own motion may correct an obvious error in the record, or may upon the basis of additional official information from the service department concerned reach a contrary conclusion.

[(b) When there is a disagreement among the members of the section the concurrence of the Chairman with the majority of members of such section shall constitute the final determination of the Board, except that the Board on its own motion may correct an obvious error in the record, or may upon the basis of additional official information from the service department concerned reach a contrary conclusion.

[4004. Jurisdiction of the Board

[(a) All questions on claims involving benefits under the laws administered by the Veterans' Administration shall be subject to one review on appeal to the Administrator. Final decisions on such appeals shall be made by the Board.

[(b) When a claim is disallowed by the Board, it may not thereafter be reopened and allowed, and no claim based upon the same factual basis shall be considered; however, where subsequent to disallowance of a claim, new and material evidence in the form of official reports from the proper service department is secured, the Board may authorize the reopening of the claim and review of the former decision.

[(c) The Board shall be bound in its decisions by the regulations of the Veterans' Administration, instructions of the Administrator, and the precedent opinions of the chief law officer.

[(d) The decisions of the Board shall be in writing and shall contain findings of fact and conclusions of law separately stated.

[§ 4005. Filing of notice of disagreement and appeal

[(a) Appellate review will be initiated by a notice of disagreement and completed by a substantive appeal after a statement of the case is furnished as prescribed in this section. Each appellant will be accorded hearing and representation rights pursuant to the provisions of this chapter and regulations of the Administrator.

[(b)(1) Except in the case of simultaneously contested claims, notice of disagreement shall be filed within one year from the date of mailing of notice of the result of initial review or determination. Such notice, and appeals, must be in writing and be filed with the activity which entered the determination with which disagreement is expressed (hereafter referred to as the "agency of original jurisdiction"). A notice of disagreement postmarked before the expiration of the one-year period will be accepted as timely filed.

[(2) Notices of disagreement, and appeals, must be in writing and may be filed by the claimant, the claimant's legal guardian, or such accredited representative, attorney, or authorized agent as may be selected by the claimant or legal guardian. Not more than one recognized organization, attorney, or agent will be recognized at any one time in the prosecution of a claim.

[(c) If no notice of disagreement is filed in accordance with this chapter within the prescribed period, the action or determination shall become final and the claim will not thereafter be reopened or allowed, except as may otherwise be provided by regulations not inconsistent with this title.

[(d)(1) Where the claimant, or the claimant's representative, within the time specified in this chapter, files a notice of disagreement with the decision of the agency of original jurisdiction, such agency will take such development or review action as it deems proper under the provisions of regulations not inconsistent with this title. If such action does not resolve the disagreement either by granting the benefit sought or through withdrawal of the notice of disagreement, such agency will prepare a statement of the case consisting of—

[(A) A summary of the evidence in the case pertinent to the issue of issues with which disagreement has been expressed;

[(B) A citation or discussion of the pertinent law, regulations, and, where applicable, the provisions of the Schedule for Rating Disabilities;

[(C) The decision on such issue or issues and a summary of the reasons therefor.

[(2) A statement of the case, as required by this subsection, will not disclose matters that would be contrary to section 3301 of this title or otherwise contrary to the public interest. Such matters may be disclosed to a designated representative unless the relationship between the claimant and the representative is such that disclosure to the representative would be as harmful as if made to the claimant.

[(3) Copies of the "statement of the case" prescribed in paragraph (1) of this subsection will be submitted to the claimant and to the claimant's representative, if there is one. The claimant will be afforded a period of sixty days from the date the statement of the case is mailed to file the formal appeal. This may be extended for a reasonable period on request for good cause shown. The appeal should set out specific allegations of error of fact or law, such allegations related to specific items in the statement of the case. The benefits sought on appeal must be clearly identified. The agency of original jurisdiction may close the case for failure to respond after receipt of the statement of the case, but questions as to timeliness or adequacy of response shall be determined by the Board of Veterans' Appeals.

[(4) The appellant will be presumed to be in agreement with any statement of fact contained in the statement of the case to which no exception is taken.

[(5) The Board of Veterans' Appeals will base its decision on the entire record and may dismiss any appeal which fails to allege specific error of fact or law in the determination being appealed.

[§ 4005A. Simultaneously contested claims

[(a) In simultaneously contested claims where one is allowed and one rejected, the time allowed for the filing of a notice of disagreement shall be sixty days from the date notice of the adverse action is mailed. In such cases the agency of original jurisdiction shall promptly notify all parties in interest at the last known address of the action taken, expressly inviting attention to the fact that notice of disagreement will not be entertained unless filed within the sixty-day period prescribed by this subsection.

[(b) Upon the filing of a notice of disagreement, all parties in interest will be furnished with a statement of the case in the same manner as is prescribed in section 4005. The party in interest who filed a notice of disagreement will be allowed thirty days from the date of mailing of such statement of the case in which to file a formal appeal. Extension of time may be granted for good cause shown but with consideration to the interests of the other parties involved. The substance of the appeal will be communicated to the other party or parties in interest and a period of thirty days will be allowed for filing a brief or argument in answer thereto. Such notice shall be forwarded to the last known address of record of the parties concerned, and such action shall constitute sufficient evidence of notice.

[§ 4006. Administrative appeals

[Application of review on appeal may be made within the one-year period prescribed in section 4005 of this title by such officials of the Veterans' Administration as may be designated by the Administrator. An application entered under this paragraph shall not operate to deprive the claimant of the right of review on appeal as provided in this chapter.

[§ 4007. Docketing of appeals

[All cases received pursuant to application for review on appeal shall be considered and decided in regular order according to their places upon the docket; however, for cause shown a case may be advanced on motion for earlier consideration and determination. Every such motion shall set forth succinctly the grounds upon which it is based. No such motion shall be granted except in cases involving interpretation of law of general application affecting other claims, or for other sufficient cause shown.

[§ 4008. Rejection of applications

[An application for review on appeal shall not be entertained unless it is in conformity with this chapter.

[§ 4009. Independent medical opinions

[(a) When, in the judgment of the Board, expert medical opinion, in addition to that available within the Veterans' Administration, is warranted by the medical complexity or controversy involved in an appeal case, the Board is authorized to secure an advisory medical opinion from one or more independent medical experts who are not employees of the Veterans' Administration.

[(b) The Administrator shall make necessary arrangements with recognized medical schools, universities, clinics to furnish such advisory medical opinions at the request of the Chairman of the Board. Such arrangement will provide that the actual selection of the expert or experts to give the advisory opinion in any individual case will be made by an appropriate official of such institution.]

CHAPTER 71—COURT OF VETERANS APPEALS

SUBCHAPTER I—ORGANIZATION AND JURISDICTION

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SUBCHAPTER I—ORGANIZATION AND JURISDICTION

§ 4001. Status

"There is hereby established, under article I of the Constitution, a court of record to be known as the United States Court of Veterans Appeals.

§ 4002. Jurisdiction; finality of decisions

"The Court of Veterans Appeals shall have exclusive jurisdiction to consider all questions involving benefits under laws administered by the Veterans Administration. Decisions by the Court are subject to review as provided in section 4042 of this title. A determination by the Court of Veterans Appeals as to a factual matter may not be reviewed in any other court. The Court may not review the schedule of ratings for disabilities under section 335 of this title or any action of the Administrator in adopting or revising that schedule.

§ 4003. Composition

(a) The Court of Veterans Appeals shall be composed of a chief judge, two deputy chief judges, and not more than 62 associate judges.

(b) The judges of the Court of Veterans Appeals shall be appointed by the President, by and with the advice and consent of the Senate, solely on the grounds of fitness to perform the duties of the office. A person may not be appointed to the Court who is not a member of the bar of a Federal court or of the highest court of a State.

(c) The term of office of the chief judge and of the two deputy chief judges of the Court shall be 15 years. The term of office of an associate judge of the Court shall be 10 years.

(d) The chief judge is the head of the Court. The deputy chief judges shall perform such functions as the chief judge directs.

(e)(1) The chief judge and the two deputy chief judges shall each receive a salary at the same rate as is in effect for judges of the district courts of the United States.

(2) The associate judges of the Court shall each receive a salary at a rate not to exceed the rate of basic pay in effect for positions at Level IV of the Executive Schedule.

(f)(1) A judge of the Court of Veterans Appeals may be removed from office by the President on grounds of misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability which, in the opinion of the President, prevents the proper execution of the judge's duties. A judge of the Court may not be removed from office by the President on any other grounds.

(2) Before a judge may be removed from office under this subsection, the judge shall be provided with a full specification of the reasons for the removal and an opportunity to be heard.

(3) A judge of the Court who is removed from office under this subsection (other than for physical disability) shall not be permitted to practice before the Court.

§ 4004. Organization

(a) The Court of Veterans Appeals shall have a seal which shall be judicially noticed.

(b) The Court may hear cases by judges sitting alone or in panels, as designated by the chief judge. Any such panel shall have not less than three judges. The chief judge shall assign the judges of the Court to such panels and shall designate the chief of each such panel.

(c)(1) A majority of the judges of the Court shall constitute a quorum for the transaction of the business of the Court. A vacancy in the Court shall not impair the powers or affect the duties of the Court or of the remaining judges of the Court.

(2) A majority of the judges of a panel of the Court shall constitute a quorum for the transaction of the business of the panel. A vacancy in a panel of the Court shall not impair the powers or affect the duties of the panel or of the remaining judges of the panel.

§ 4005. Offices

The principal office of the Court of Veterans Appeals shall be in the District of Columbia, but the Court and any panel of the Court may sit at any place within the United States.

§ 4006. Times and places of sessions

The times and places of sessions of the Court of Veterans Appeals shall be prescribed by the chief judge. Those times and places shall be prescribed with a view to securing reasonable opportunity to petitioners to appear before the Court with as little inconvenience and expense to petitioners as practicable.

SUBCHAPTER II—PROCEDURE

§ 4011. Fee for filing petition

The Court of Veterans Appeals may impose a fee for the filing of any petition with the courts. The amount of any such fee may not exceed $50. The court shall establish procedures under which such a fee may be waived in the case of a person who demonstrates that the requirement that such fee be paid will impose a hardship. A decision as to such a waiver is final and may not be reviewed in any other court.

§ 4012. Representation of parties; fee agreements

(a) The Administrator shall be represented before the Court of Veterans Appeals by the General Counsel of the Veterans' Administration. A petitioner shall be represented in accordance with the rules of practice prescribed by the Court. A qualified person may not be denied admission to practice before the Court by reason of failure to be a member of any profession or calling.

(b) A person who represents a petitioner before the Court shall file a copy of any fee agreement between the petitioner and that person

with the Court at the time the petition is filed. The Court may review such a fee arrangement and may order a reduction in the fee called for in the agreement if it finds that the fee is excessive or unreasonable. An order under this subsection is final and may not be reviewed in any other court.

§ 4013. Rules of practice, procedure, and evidence

(a) The proceedings of the Court of Veterans Appeals shall be conducted in accordance with such rules of practice, procedure, and evidence as the Court prescribes.

(b) The mailing of a pleading, decision, order, notice, or process in respect of proceedings before the Court shall be held sufficient service of such pleading, decision, order, notice, or process if it is properly addressed to the address furnished by the petitioner on the notice of appeal and it is mailed by certified or registered mail.

§ 4014. Administration of oaths and procurement of testimony

(a) Oaths may be administered by a judge of the Court of Veterans Appeals, the clerk of the Court and any deputy clerk of the Court, and any other employee of the Court designated in writing for such purpose by the chief judge.

(b)(1) A judge of the Court and any employee of the Court designated for such purpose under section 4017(b) of this title may examine witnesses.

(2) A judge of the Court may require by subpoena—

(A) the attendance and testimony of witnesses, and the production of all necessary books, papers, documents, correspondence, and other evidence, from any place in the United States at any designated place of hearing, and

(B) the taking of a deposition before any designated individual competent to administer oaths under this chapter.

(3) In the case of a deposition, the testimony shall be reduced to writing by the individual taking the deposition or under that individual's direction and shall then be subscribed by the person giving the deposition.

(4) A subpoena under this subsection shall be ordered by the Court of Veterans Appeals and shall be signed by the chief judge (or the clerk of the Court or any other employee of the Court when acting as deputy clerk).

(c) The Court shall, upon a showing of good cause, require employees of the Veterans' Administration to testify at a hearing or to give a deposition in a proceeding before the Court.

(d)(1) The Court shall have power to punish by fine or imprisonment such contempt of its authority as—

(A) misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(B) misbehavior of any of its officers in their official transactions; or

(C) disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

(2) The Court shall have such assistance in the carrying out of its lawful writ, process, order, rule, decree, or command as is available to a court of the United States. The United States marshal for a

district in which the Court is sitting shall, if requested by the chief judge of the Court, attend any session of the Court in that district.

§ 4015. Filing of notice of disagreement and appeal

(a)(1) A petitioner may initiate review by the Court of Veterans Appeals by filing a notice of disagreement with the activity or office (hereinafter in this chapter referred to as the "agency of original jurisdiction") which made the determination with which disagreement is expressed. Any such notice must be filed within 180 days of the mailing of the notice of decision. In simultaneously contested claims where one is allowed and one is denied, the time allowed for filing a notice of disagreement shall be 60 days from the date notice of the adverse decision is mailed. In such a case, the agency of original jurisdiction shall notify all interested persons of the shortened time period for filing a notice of disagreement.

(2) A notice of disagreement shall be in writing and shall be filed by the petitioner.

(3) If a notice of disagreement is not filed in accordance with this section within the prescribed period, the determination shall become final and the petitioner may not thereafter request reconsideration of the claim except as permitted by this title.

(b) If a petitioner files a notice of disagreement within the prescribed period with the agency of original jurisdiction, the agency or original jurisdiction shall take such action to develop additional evidence or to review the case as it considers proper. If that action does not resolve the disagreement either by granting the benefit sought or through withdrawal of the notice of disagreement, the agency of original jurisdiction shall promptly issue to the petitioner a formal statement containing the matters specified in subsection (c) of this section and known as a statement of the case.

(c) A statement of the case under subsection (b) of this section shall include the following:

(1) A summary of the evidence in the case pertinent to the issue or issues with which disagreement has been expressed.

(2) A citation to pertinent laws and regulations and a discussion of how such laws and regulations affect the agency's decision.

(3) The decision on each issue and a summary of the reasons for such decision.

(d)(1) In order to complete and perfect an appeal to the Court, the petitioner must file a formal appeal with the Court as prescribed by the rules of the Court within 90 days of the mailing of the statement of the case. Such time period may be extended by the Court for good cause shown.

(2) An appeal shall be in such form as the Court shall by rule prescribe. An appeal shall set out specific allegations of error of fact or law which are related to issues presented by the petitioner's claim. The benefits sought on appeal shall be clearly identified.

(e)(1) The Court shall base its decision on the entire record. The Court may dismiss an appeal which fails to allege a specific error of fact or law in the determination being appealed.

(2) If the Court finds that the record sets forth insufficient evidence upon which to base a decision, the Court may remand the petition or take such other steps as it considers appropriate.

(f) The agency of original jurisdiction and the Court shall adopt appropriate procedures to expedite decisions on simultaneous claims in order to assure a prompt and fair resolution of a disagreement.

§4016. Witness fees

(a) A witness who is summoned or whose deposition is taken under section 4015 of this title shall receive the same fees and mileage as witnesses in courts of the United States.

(b) Such fees and mileage and the expenses of taking any such deposition shall be paid as follows:

(1) In the case of a witness for the Administrator, such payments shall be made by the Administrator out of moneys appropriated for general operating expenses and may be paid in advance.

(2) In the case of any other witness, such payments shall be made, subject to rules prescribed by the Court of Veterans Appeals, by the party at whose instance the witness appears or the deposition is taken.

§4017. Hearings

(a) Notice and opportunity to be heard upon a proceeding instituted before the Court of Veterans Appeals shall be given to the petitioner and to the Administrator. A hearing before the Court may be closed to the public upon the determination of the Court. The testimony and the argument at any such hearing shall be stenographically reported.

(b) The Court may designate employees of the Court to conduct hearings relating to a case and to make recommendations to the Court with respect to the case.

§4018. Decisions

(a) A decision upon a proceeding before the Court of Veterans Appeals shall be made as quickly as practicable. In a case heard by a panel of the Court, the decision shall be made by a majority vote of the panel in accordance with the rules of the Court. The decision of the judge or panel hearing the case so made shall be the decision of the Court except as provided in subsection (d) of this section.

(b) The Court shall include in its decision upon a proceeding a statement of its findings of fact and conclusions of law. Subject to such conditions as the Court may by rule provide, the requirements of this subsection are met if findings of fact or conclusions of law are stated orally and recorded in the transcript of the proceedings.

(c) A judge or panel shall make a determination upon any proceeding before the Court, and any motion in connection therewith, that is assigned to the judge or panel by the chief judge. The judge or panel shall make a report of any such determination which constitutes its final disposition of the proceeding.

(d) The decision of the judge or panel shall become the decision of the Court at the end of the 30-day period beginning on the date of the report by the judge or panel, unless within that period the chief judge, upon the motion of either party, at the request of the judge or panel, or at the chief judge's own initiative, directs that such decision shall be reviewed by an enlarged panel of the Court. The decision of a judge or panel shall not be a part of the record in any case

in which the chief judge directs that such report shall be reviewed by an enlarged panel of the Court.

(e) The Court shall designate in any such decision those specific records of the Government on which it relied (if any) in making its decision. The Administrator shall preserve records so designated for not less than the period of time designated by the Administrator of the National Archives and Records Administration.

§4019. Availability of proceedings

(a) Except as provided in subsection (b) of this section, all decisions of the Court of Veterans Appeals and all evidence received by the Court and its panels, including a transcript of the stenographic report of the hearings, shall be public records open to the inspection of the public.

(b)(1) The Court may make any provision which is necessary to prevent the disclosure of confidential information, including a provision that any such document or information be placed under seal to be opened only as directed by the Court.

(2) After the decision of the Court in a proceeding becomes final, the Court shall permit the withdrawal by the party entitled thereto of originals of books, documents, and records, and of models, diagrams, and other exhibits, introduced in evidence before the Court or any panel or the Court may, on its own motion, make such other disposition thereof as it considers advisable.

§4020. Publication of reports

(a) The Chief Judge shall designate in those decisions of the Court of Veterans Appeals which shall have value as a precedent.

(b) The Court shall provide for the publication of decisions so designated in such form and manner as may be best adapted for public information and use.

(c) Such authorized publication shall be competent evidence of the reports of the Court of Veterans Appeals therein contained in all courts of the United States and of the several States without any further proof or authentication thereof.

(d) Such reports shall be subject to sale in the same manner and upon the same terms as other public documents.

SUBCHAPTER III—MISCELLANEOUS PROVISIONS

§4031. Employees

(a) The Court of Veterans Appeals may appoint, in accordance with the provisions of title 5 governing appointment in the competitive service, and may fix the basic pay of, in accordance with chapter 51 and subchapter III of chapter 53 of such title, such employees as may be necessary to execute the functions vested in the Court. The Court may classify such positions based upon the classification of comparable positions in the judicial branch.

(b) The Court may employ physicians and other health professionals to provide it with expert medical advice.

§4032. Expenditures

(a) The Court of Veterans Appeals may make such expenditures (including expenditures for personal services and rent at the seat of

Government and elsewhere, and for law books, books of reference, and periodicals) as may be necessary efficiently to execute the functions vested in the Court. Except as provided in section 4035 of this title, all expenditures of the Court shall be allowed and paid, out of any moneys appropriated for purposes of the Court, upon presentation of itemized vouchers signed by the certifying officer designated by the chief judge.

§ 4033. Disposition of fees

Except as provided in section 4035 of this title, all fees received by the Court of Veterans Appeals shall be covered into the Treasury as miscellaneous receipts.

§ 4034. Fee for transcript of record

The Court of Veterans Appeals may fix a fee, not in excess of the fee fixed by law to be charged and collected therefor by the clerks of the district courts, for comparing, or for preparing and comparing, a transcript of the record, or for copying any record, entry, or other paper and the comparison and certification thereof.

§ 4035. Practice fee

(a) The Court of Veterans Appeals may impose a periodic registration fee on persons admitted to practice before the Court. The frequency and amount of such fee shall be determined by the Court, except that such amount may not exceed $30 per year.

(b) The fees described in subsection (a) of this section shall be available to the Court for the purpose of employing independent counsel to pursue disciplinary matters.

SUBCHAPTER IV—DECISIONS AND REVIEW

§ 4041. Date when Court of Veterans Appeals decision becomes final

(a) A decision of the Court of Veterans Appeals shall become final—

(1) upon the expiration of the time allowed for filing a notice of appeal from such decision, if no such notice is duly filed within such time; or

(2) if such a notice is filed within such time]

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the decision of the Court of Veterans Appeals is affirmed or the appeal is dismissed by the United States Court of Appeals for the Federal Circuit and no petition for certiorari is duly filed;

(B) upon the denial of a petition for certiorari, if the decision of the Court of Veterans Appeals is affirmed or the appeal is dismissed by the United States Court of Appeals for the Federal Circuit; or

(C) upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if that Court directs that the decision of the Court of Veterans Appeals be affirmed or the appeal dismissed.

(b)(1) If the Supreme Court directs that the decision of the Court of Veterans Appeals be modified or reversed, the decision of the Court of Veterans Appeals rendered in accordance with the mandate

of the Supreme Court shall become final upon the expiration of 30 days from the time it was rendered, unless within such 30 days either the Administrator or the petitioner has instituted proceedings to have such decision corrected to accord with the mandate, in which event the decision of the Court of Veterans Appeals shall become final when so corrected.

(2) If the decision of the Court of Veterans Appeals is modified or reversed by the United States Court of Appeals for the Federal Circuit and if—

(A) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or

(B) the petition for certiorari has been denied, or

(C) the decision of the United States Court of Appeals for the Federal Circuit has been affirmed by the Supreme Court,

then the decision of the Court of Veterans Appeals rendered in accordance with the mandate of the United States Court of Appeals for the Federal Circuit shall become final on the expiration of 30 days from the time such decision of the Court of Veterans Appeals was rendered, unless within such 30 days either the Administrator or the petitioner has instituted proceedings to have such decision corrected so that it will accord with the mandate, in which event the decision of the Court of Veterans Appeals shall become final when so corrected.

(c) If the Supreme Court orders a rehearing, or if the case is remanded by the United States Court of Appeals for the Federal Circuit to the Court of Veterans Appeals for a rehearing, and if—

(1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or

(2) the petition for certiorari has been denied, or

(3) the decision of the United States Court of Appeals for the Federal Circuit has been affirmed by the Supreme Court, then the decision of the Court of Veterans Appeals rendered upon such rehearing shall become final in the same manner as though no prior decision of the Court of Veterans Appeals had been rendered.

(d) As used in this section, the term "mandate", in case a mandate has been recalled before the expiration of 30 days from the date of issuance thereof, means the final mandate.

§4042. Review by Court of Appeals for the Federal Circuit

(a)(1)(A) After a decision of the Court of Veterans Appeals is entered in a case, any party to the case may obtain a review of the decision with respect to the validity of any statute or regulation (other than the schedule of ratings for disabilities under section 355 of this title) or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision. Such a review shall be obtained by filing a notice of appeal within such time after the notice of such decision is mailed to the petitioner as may be prescribed by the Supreme Court under section 2072 of title 28.

(B) The United States Courts of Appeals for the Federal Circuit shall have exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under this section, and to interpret constitutional

and statutory provisions, to the extent presented and necessary to a decision. The judgment of such court shall be final subject to review by the Supreme Court Upon certiorari, in the manner provided in section 1254 of title 28.

(2)(A) When a judge or panel of the Court of Veterans' Appeals determines that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that there is in fact a disagreement between the petitioner and the Veterans' Administration with respect to that question of law and that the ultimate termination of the case may be materially advanced by the immediate consideration of that question, the judge or panel shall notify the chief judge of that determination. Upon receiving such a notification, the chief judge shall certify that such a question is presented, and any party to the case may then petition the United States Court of Appeals for the Federal Circuit to decide the question. That court may permit an interlocutory appeal to be taken on that question if such a petition is filed with it within 10 days after the certification by the chief judge of the Court of Veterans Appeals. Neither the application for, nor the granting of, an appeal under this paragraph shall stay proceedings in the Court of Veterans Appeals, unless a stay is ordered by a judge of the Court of Veterans Appeals or by the United States Court of Appeals for the Federal Circuit.

(B) for purposes of subsections (b) and (c) of this section, an order described in this paragraph shall be treated as a decision of the Court of Veterans Appeals.

(b) The Court of Appeals for the Federal Circuit shall decide all relevant questions of law, including interpreting constitutional and statutory provisions. The court shall hold unlawful and set aside any statute or regulation or any interpretation thereof (other than a determination as to a factual matter) that was relied upon in the decision of the Court of Veterans Appeals that the Court of Appeals for the Federal Circuit finds to be—

> *(1) contrary to constitutional right, power, privilege, or immunity;*
>
> *(2) in excess of statutory jurisdiction or authority;*
>
> *(3) without observance of procedure required by law; or*
>
> *(4) resting upon a policy judgment, resasoning, or factual premise so unacceptable as to render the matter arbitrary or capricious.*

The Court of Appeals may not review the facts of the appeal or the application of any law or regulation to those facts unless there is presented a constitutional issue.

(c)(1) Upon such review, the Court of Appeals for the Federal Circuit shall have power to affirm or, if the decision of the Court of Veterans Appeals is not in accordance with law, to modify or to reverse the decision of the Court of Veterans Appeals. If the decision is modified or reversed, the Court shall remand the case to the Court of Veterans Appeals for a rehearing, as justice may require.

(2) Rules for review of decisions of the Court of Veterans Appeals shall be those prescribed by the Supreme Court under section 2072 of title 28.

(3) The United States Court of Appeals for the Federal Circuit and the Supreme Court may impose damages in a case in which the

decision of the Court of Veterans Appeals is affirmed and it appears that the notice of appeal was filed merely for delay.

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